87-1760

Supreme Court, U.S.
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RECORD NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

DIANA M. PERKINSON AND FRANK N. PERKINSON, JR., t/a PERKINSON & PERKINSON, A PARTNERSHIP
Petitioners

v.

DONALD W. HUFFMAN, TRUSTEE FOR BILLY H. HARBOUR, DEBTOR; AND BLUEFIELD HOLDING COMPANY
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN H. KENNETT, JR.
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, DIANA M. PERKINSON and FRANK N. PERKINSON, JR., petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit as follows:

1. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Are defendants, who have not filed proofs of claim or otherwise made an appearance in a bankruptcy proceeding, entitled to trial by jury when sued by a trustee in bankruptcy for recovery of money only when such claim would be at law if brought by the bankrupt without intervention of the bankruptcy proceeding?

(2) Should such suit be presided over by an Article llljudge when substantive

questions of state law are involved?

11. NAMES OF PARTIES

The names of all the parties are listed in the caption. Because there may be a conflict between the Petitioners, each is represented separately in the trial court; but because the issues on appeal and this review of the appellate decision are identical, they petition jointly by Mr. Perkinson's counsel. The Respondents are jointly represented by Donald W. Huffman, Esquire, 126 Church Avenue, Southwest, Roanoke, Virginia, 24011, Telephone (703) 982-1755.

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1V. REFERENCE TO REPORTS AND OPINIONS

By judgment on March 2, 1988, the United States Court of Appeals for the Fourth Circuit affirmed on an interlocutory appeal the decision of the United States District Court for the Western District of Virginia at Lynchburg, Virginia, denying the right of trial by jury and transferring further proceedings to the bankruptcy court. The judgment on appeal is accompanied by a very scholarly opinion including a vigorous dissent and is to be reported in the Federal Reports, Second Series; but the book and page numbers are not yet determined. This decision is contained in the appendix of this petition.

V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

The Petitioners are parties in a case in, and are aggrieved by a decision of, the United States Court of Appeals

for the Fourth Circuit denying them right of trial by jury and they invoke jurisdiction of this Court to review said decision by writ of certiorari; and

(1) The judgment sought to be reviewed was made and entered by the United States Court of Appeals for the Fourth Circuit on March 2, 1988 resulting in a published decision which is included in the appendix;

(2) Because few of the reasons in guidelines published by said court of appeals for a petition for rehearing *en banc* existed and because the three judge panel of the court of appeals took twenty-two months from the date of argument to decide the case and then decided it by split decision, the Petitioners concluded all members of the court of appeals supplied imput in the respective and scholarly majority and minority decisions; thus the

decision was not only final legally but also it would not be changed by petition for rehearing; and to avoid further loss of time, review is sought by this petition for writ of certiorari without filing a petition for rehearing by the court of appeals;

(3) The statutory provisions believed to confer jurisdiction on this Court to review the final judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

V1. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These provisions are listed as follows; but because they are lengthy, the pertinent texts are set forth in the appendix:

(1) Constitution of the United States

Article 1, Section 8, Clause 4

Amendment V11

(2) United States Code

11 U.S.C. § 544(b)

11 U.S.C. § 547

11 U.S.C. § 548

28 U.S.C. § 157

28 U.S.C. § 1334

(3) Code of Virginia of 1950 as amended

Va. Code § 55-81

V11. STATEMENT OF CASE

The Petitioners are jointly referred to as "Perkinsons" and separately as "Mr. Perkinson" or "Mrs. Perkinson". The Respondents are jointly referred to as the "Trustee" even though Bluefield Holding Company is not a debtor in bankruptcy. The United States Court of Appeals for the Fourth Circuit is referred to as the "court of appeals"; the United States District Court for the Western District of Virginia is referred to as the "district court"; and the United States Bankruptcy

Court for the Western District of Virginia is referred to as the "bankruptcy court".

Billy H. Harbour had been adjudicated a bankrupt and he owned all the capital stock of Bluefield Holding Company which was not adjudicated a bankrupt or under bankruptcy supervision. The Trustee commenced an adversary proceeding within the bankruptcy court against the Perkinsons to avoid allegedly preferential and fraudulent transfers as respectively defined by 11 U.S.C. § § 547 and 548 and voluntary conveyances as defined by Va. Code § 55-81 for which the Trustee is authorized to make claim pursuant to 11 U.S.C. § 544(b). The Perkinsons held no specific funds or property and the claims were for money damages only asserted by five different counts involving five different factual

situations. [1] Mr. Perkinson filed a motion for abstention, a motion for jury trial if abstention was denied and a motion to transfer to the district court for a decision on the motions. The bankruptcy court transferred the matter to the district court. On August 27, 1985, the district judge entered an order denying abstention and denying jury trial and remanded the case to the bankruptcy court in Roanoke instead of Lynchburg. [2]

1/ There were two such proceedings instituted by the Trustee. The second proceeding did not involve Bluefield Holding Company but was otherwise identical in theory and involved four separate counts. One of these counts alleged Billy H. Harbour had transferred to Mrs. Perkinson jewelry as a gift, but the claim was for money only and not a return of the specific jewelry or its appraised value at the time of the suit. The ruling of the district court was the same in the second adversary proceeding; but the order was stayed pending the interlocutory appeal from the first adversary proceeding; and both complaints were included in the appendix filed with the court of appeals.

Because of the differences of opinion on the right of trial by jury in bankruptcy cases and because nine factual disputes are involved between the Trustee and the Perkinsons which would have to be retried by jury if the issue of trial by jury is not decided in advance, the trial court amended its order on August 27, 1985 by order on September 3, 1985 to permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure. The court of appeals granted the Perkinsons' petition for interlocutory appeal.

All claims by the Trustee are factually against Mrs. Perkinson as a lawyer and are also asserted against Mr.

2/ The district judge's attached memorandum of opinion referred to both cases.

Perkinson alleging he is jointly liable with her under Virginia law because he is her law partner. Mrs. Perkinson rendered legal services to Billy H. Harbour before the bankruptcy proceeding and rendered legal services to Bluefield Holding Company before and during the bankruptcy proceeding. Funds were paid to her by Mr. Harbour and the corporation for alleged legal services rendered; these payments were alternatively alleged to have been made: (i) to hinder, delay or defraud creditors or (ii) to pay an antecedent debt for legal services rendered or (iii) for sums more than the equivalent value of the legal services at the time of transfer and the transferor was insolvent or became insolvent as a result of such transfer. Many of the transfers were more than one year prior to the first involuntary petition

for bankruptcy. A determination of the merits of the claim is awaiting decision on whether the Perkinsons are entitled to a jury trial and whether the trial should be presided over by the district judge or the bankruptcy judge. The Perkinsons are not otherwise involved in the bankruptcy proceeding and have made no claim against the bankruptcy estate.

V111. ARGUMENT

POINT NO. 1 - THE PERKINSONS ARE ENTITLED TO TRIAL BY JURY

Amendment V11 of the Constitution of the United States of America provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

The Supreme Court of the United States has stated that the right of jury trial in civil cases at common law is a basic

and fundamental feature of our system of federal jurisprudence. *Hodges v. Easton*, 106 U.S. 408, 27 L.Ed 169, 1 Sup. Ct. 307 (1882); and must be guarded with jealousy. *Baylis v. Travelers Ins. Co.* 113 U.S. 316, 28 L.Ed 989, 5 Sup. Ct. 494 (1885). In the early case of *Parson v. Bedford*, 28 U.S. 433, 7 L.Ed & 32 (1830), the Supreme Court held the phrase "common law" found in the Seventh Amendment, preserving the right of trial by jury in suits at common law, is used in contradistinction to equity suits and admiralty; and it is well known in civil causes in courts of equity and admiralty, juries do not intervene. The Court concluded the reference in the Seventh Amendment to the "common law" did not merely mean suits which the common law recognized among its old and settled proceedings, but also suits in

which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered. The Court further stated that in a just sense, the Seventh Amendment may well be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the particular forum which they assume to settle legal rights. In *Curtis v. Loether*, 415 U.S. 189, 39 L.2d 200, 94 Sup. Ct. 1005, (1974), the Supreme Court quoted extensively from Mr. Justice Story's opinion in *Parson v. Bedford, supra*. Again in *Pernell v. Southhall Realty*, 416 U.S. 363, 40 L.2d 198, 94 Sup. Ct. 1723 (1974), the Supreme Court again quoted its prior decisions and specifically reiterated the right of trial by jury not only applies to suits at common

law as the same existed at the time of the adoption of the Constitution, but also applies to suits where the rights and remedies are traditionally enforced by actions at law rather than by causes in equity or admiralty, even though the precise action was unknown at common law. In that case, the landlord sought eviction of a tenant for non-payment of rent under a statutory proceeding. The Court noted suits at common law included actions of ejectment and other possessory actions for real estate; and it is immaterial whether the statutory proceeding was a close equivalent to the particular form of action at common law.

Thus the issue presented for review is whether the claims by the Trustee against the Perkinsons are at law or in equity. The substance of the claims and not the form of the claims controls.

Ross v. Bernhard, 396 U.S. 531, 24 L.2d 729, 90 Sup. Ct. 733, (1970). In this latter case, certain stockholders brought a derivative suit in an United States District Court alleging the defendants who had been directors of the corporation had converted assets and had charged excessive brokerage fees. Even though a stockholders' derivative suit is equitable in nature, the Court held the defendants were entitled to their constitutional right of trial by jury. The defendants would have been entitled to a jury trial if the monetary claims had been asserted by the corporation and they could not be denied this right merely because the stockholders in equity succeeded to the rights of the corporation. The legal analogy is identical to a trustee in an equitable bankruptcy proceeding deriving or succeeding to the rights of Harbour who would have had to

have brought the action at law.

Because Rule 2 of the Federal Rules of Civil Procedure provides there is only one form of action, a law review article has suggested the "legal" nature of an issue is determined by considering, first, the premerger custom with reference to questions; second, the remedy sought; and third, the practical abilities and limitations of juries. *Ross v. Bernhard, supra*, footnote 10, 396 U.S. at page 538, 24 L.2d at page 736.

The Trustee seeks monetary damages for a fraudulent conveyance under 11 U.S.C. § 548 or for a preferential transfer under 11 U.S.C. § 547 or for a voluntary conveyance under Va. Code § 55-81 for which he is authorized to make claim under 11 U.S.C. § 544(b).

The monetary claim for damages suffered from fraud and deceit was an action of trespass on the case at common

law. 37 *Corpus Juris Secundum* 351, Fraud § 62. While courts of equity have jurisdiction to relieve against fraud, if the remedy for monetary damages is complete, the claim must be at law. Thus in *Clements v. Macheboeuf*, 92 U.S. 418, 23 L.2d, 504 (1876), the opening paragraph held:

> "Equity exercises jurisdiction in cases of accident, mistake or fraud, where the party has not a plain, adequate or complete remedy at law. Where the remedy is law is plain, equity will not interfere if the remedy is also adequate and complete;... 92 U.S. at page 418, 23 L.2d at page 504.

In each of the nine factual disputes between the Trustee and the Perkinsons, the Trustee only seeks monetary damages even when an earring or watch is involved. Thus the remedy at law is adequate and complete to the extent transfers to Mrs. Perkinson are alleged

to be fraudulent and made within a year prior to the adjudication of Billy H. Harbour as a bankrupt.

In Virginia, while a suit for rescission is in equity, if the contract is deemed avoided and the claim is only for return of the money paid, the claim is an action at common law for general assumpsit or for money had and received. *Riverside Company v. Husted*, 109 Va. 688, 64 S.E. 958 (1909). Thus the remedy at law is adequate and complete to the extent transfers to Mrs. Perkinson are alleged to be for more than the equivalent value of the legal services she rendered for same. Because the bulk of the transfers were more than a year prior to the bankruptcy, the adequacy of the consideration under Virginia law is the real issue in all the claims by the Trustee.

Of course, there was no common

law action for an avoidable preference which is peculiarly a creature of statute under the various bankruptcy laws enacted from time to time. However, when the claim by a trustee for a preference is for recovery of money only, the trustee has an adequate legal remedy, equity has no jurisdiction, and the parties are entitled to trial by jury. *Schoenthal v. Irving Trust Company*, 287 U.S. 92, 77 L.Ed 185 (1932). Also see: Annotation - *Law or Equity as Proper Forum of Action or Suit by Trustee in Bankruptcy to Recover or Avoid Preference*. 77 L.Ed 189 (1932). While specifically quoting the Judicial Code of the United States in effect at the time, this Court noted the following rule had always been followed by all federal courts of equity:

> '" Suits in equity shall not be sustained in any court of the United States in any case where there is a plain, adequate, and com-

> plete remedy at law'...
> "[This enactment] serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end should be liberally construed."
> 287 U.S. at page 94, 77 L.Ed at page 187.

It is thus clear suits to recover money only for avoidable preferences are at law and not in equity.

Consequently in interpreting Rule 2 of the Federal Rules of Civil Procedure, the claims by the Trustee against the Perkinsons seeking monetary damages are at law whether the theory be fraudulent transfers or preferential transfers or voluntary transfers. Such suits are not part of the summary proceedings under Title 11 but only controversies arising out of such proceedings. *Schoenthal v. Irving Trust Company, supra.* Prior to the Bankruptcy Code of 1978, such suits were not in the bankruptcy court; the Code gave such bankruptcy courts concurrent jurisdiction;

and after reform required by *Northern Pipeline Co. v. Marathon Pipe Line*, 458 U.S. 50, 73 L.2d 598, 102 Sup. Ct. 2858 (1982), the district court now has original but not exclusive jurisdiction of such suits. 28 U.S.C. § 1334(b).

The confusion arises from the misapplication of the decision in *Katchen v. Landy*, 382 U.S. 323, 15 L.2d, 391, 86 Sup. Ct. 467 (1966). There a creditor filed a proof of claim within the summary proceedings before the bankruptcy court. The trustee contended the claimant had obtained voidable preferences from the bankrupt and demanded that such preferences be surrendered. Because the transferee of the preference had submitted to the summary jurisdiction of the bankruptcy court when filing the proof of claim, this Court held the claim by the trustee was within the summary jurisdiction of the bankruptcy court. The Court held

that the legal claim of the creditor against the bankrupt was converted by the bankruptcy statutes into an equitable claim to share pro rata with other claims. The constitutional right of trial by jury does not extend to cases of equity jurisdiction. On the other hand, this Court in that decision clearly held:

> "But although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal v. Irving Trust Company* (remainder of citation omitted), when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity." 382 U.S. at page 336, 15 L.Ed at page 401.

Thus the linchpin of the decision is the creditor, by filing a proof of claim, had submitted himself to the bankruptcy court's resolution of the claim and all issues arising in that determination.

Specifically a transferee who has not submitted to the equity jurisdiction retains his right of trial by jury.

While the decision of the court of appeals sought to be reviewed recognizes *Katchen* does not overrule *Schoenthal*, it follows in a scholarly fashion the various histories of the bankruptcy statutes. Under prior statutes, federal courts exercising bankruptcy jurisdiction were first a court of bankruptcy ending proceedings with distribution of the assets among creditors, and second an ordinary court of law and equity for suits brought by or against the assignee in reference to alleged property of the bankrupt or claims alleged to be due to or from him. The Bankruptcy Act of 1898 eliminated the second jurisdiction and consequently a trustee had to sue in other forums to recover assets by persons who did not voluntarily submit to the juris-

diction of the bankruptcy coutt. Thus the court of appeals states *Schoenthal* merely holds that such suits by a trustee in other forums, when for recovery of money, were legal in nature but now that the statute requires such suits be within the bankruptcy court, they are equitable in nature. *Schoenthal* was grounded on the long standing English and American principle that actions to avoid preferential and fraudulent conveyances were not part of the proceeding in bankruptcy, but were part of controversies arising out of it; and this long standing principle has now been changed by statute.

Such reason is clearly faulty. Of course, under Article 1, § 8, Clause 4 of the Constitution, Congress has the power to establish a uniform federal bankruptcy scheme and require conflicting state laws to conform. However, this does

not give Congress the authority to abrogate other constitutional guarantees such as the right of trial by jury. Eg: *Louisville Bank v. Radford*, 295 U.S. 555, 79 L.Ed 1593 (1935) (holding bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment); and *Northern Pipeline Co. v. Marathon Pipe Line, supra*, (holding bankruptcy power is subject to Article 111).

Accordingly the Perkinsons contend the decision of the court of appeals denying their right of trial by jury under the claim of the Trustee is clearly erroneous and decided contrary to the decisions of this Court; and for this reason, the decision should be reviewed by writ of certiorari. Even if the decision is correct, the prevailing view in bankruptcy courts within other circuits is the defendants in adversary suits brought by a trustee are entitled to trial by jury if

they have not filed formal proofs of claims; but they are not entitled to trial by jury if they have filed proofs of claims. Eg: *Matter of Silver Mill Frozen Foods, Inc.*, 80 B.R. 848 (W.D. Mich. 1987) (holding *Katchen* requires capture of jurisdiction in bankruptcy when a defendant has filed a proof of claim but *Schoenthal* upholds right of trial by jury under the Seventh Amendment when a defendant has not filed a proof of claim). Accordingly the conflicting decisions on this important issue of federal law needs to be clarified by review on writ of certiorari to the decision of the court of appeals.

POINT 2: THE TRIAL SHOULD BE PRESIDED OVER BY A DISTRICT JUDGE AND NOT A BANKRUPTCY JUDGE

As already argued, the claim of the Trustee against the Perkinsons is not under Title 11 but is a controversy arising out of Title 11. 28 U.S.C.

§ 1334(a) now vests the district courts with original and exclusive jurisdiction of all cases under Title 11 and 28 U.S.C. § 1334(b) now vests such district courts with original but not exclusive jurisdiction of civil proceedings arising under Title 11 or arising or related to cases under Title 11. Clearly the Trustee may assert the adversary proceeding against the Perkinsons in the district court. However this jurisdiction is vested in the district court and not the bankruptcy court.

Clearly under Article 1, § 8, Clause 4 of the Constitution, Congress can create a federal question cause of action, as it has done here in 11 U.S.C. § 547 for preferences and 11 U.S.C. § 548 for fraudulent transfers and can authorize a trustee in bankruptcy to proceed against the beneficiary of a preferential or fraudulent transfer under such federal substantive law. It can also

authorize a trustee in bankruptcy to proceed against a beneficiary of a voluntary conveyance under state substantive law such as Va. Code § 55-81 as it has done in 11 U.S.C. § 544(b). The Perkinsons do not contest the jurisdiction of the district court but only contest the transfer of jurisdiction of the bankruptcy court. The dissenting opinion of the court of appeals favoring right of trial by jury omitted the discussion of the Perkinsons' contention here because it erroneously assumed the district court had avoided the pitfalls hereby mentioned by retaining jurisdiction instead of remanding the case to the bankruptcy court on denial of trial by jury. Specifically the dissent held:

> "*Northern Pipeline* requires that when someone is made a party to a proceeding in a bankruptcy case involuntarily, as here, that he be brought before an Article 111 court. The district judge in this case prudently held to himself the decision of the adversary proceeding did not

> refer to a bankruptcy judge. By so doing, the district court wisely finessed the even more ticklish question than the one present here." Appendix, page

To clarify the matter, the order of the district court is included in the appendix.

28 U.S.C. § 544(b) does not suspend state law but rather incorporates state law into the bankruptcy scheme, authorizing the trustee to stand in the shoes of the debtor and unsecured creditors for the purpose of asserting any claims available to them under any law including state law. If there was no bankruptcy case, the bankrupt or his creditors would have to have sued the Perkinsons under state substantive law asserting Mrs. Perkinson did not render legal services of equivalent value to the compensation received. This is not changed by federal substantive law under the bankruptcy scheme.

Article 111 of the Constitution of the United States vests judicial power of the United States in one supreme court and such inferior courts as Congress may from time to time ordain and establish. The judges of both the supreme and superior courts hold office doing good behavior and shall, at stated times, receive for their services, a compensation which shall not be diminished during the continuance in office. Without elaborating on authority, the district court is an Article 111 court. Because bankruptcy judges do not have life tenure and may suffer reductions in compensation, bankruptcy courts are not Article 111 courts which may exercise the judicial power of the United States. Accordingly *Northern Pipeline v. Marathon Pipe Line, supra,* held bankruptcy judges could not preside over judicial proceedings and specifically held a claim by a trustee in bankruptcy

against the debtors of the bankrupt under state law was a judicial proceeding.

As a result, the bankruptcy statutes were amended vesting such jurisdiction in the district court as stated. 28 U.S.C. § 1334. The bankruptcy court is now an adjunct to the district court. 28 U.S.C. § 157(a) provides the district courts *may* provide certain cases be referred to bankruptcy judges for the district. 28 U.S.C. § 157(b)(1) provides bankruptcy judges *may* hear and determine all cases under Title 11 and all core proceedings arising under Title 11 or arising in a case under Title 11. Subsection (F) under 28 U.S.C. § 157(b) defines core proceedings to include proceedings to determine, avoid or recover preferences and Subsection (H) defines core proceedings to include proceedings to

determine, avoid or recover fraudulent conveyances. However, 28 U.S.C. § 157(d) permits the district court to withdraw any claim from a bankruptcy judge. Thus there is no mandate requiring the bankruptcy judge rather than the district judge to hear the case of the Trustee against the Perkinsons.

First the Perkinsons contend the proceeding is not a "core" proceeding because it is not a suit in equity to rescind a transfer or to return a specific sum or property but merely a claim for monetary damages. Second they contend that if the claims are core proceedings, the district court may withdraw the same. Under Rule 2 of the Federal Rules of Civil Procedure, there is only civil action; but the district judge nevertheless determines whether the action is legal or equitable in nature when deciding upon whether or not to grant

trial by jury. In some cases, trials by jury are authorized by statute even when not constitutionally required; and apparently when there is a bench trial, the appeal follows equitable standards rather than legal standards even if an action at law. Similarly a district judge may determine whether a particular adversary proceeding in bankruptcy is summary or judicial; transfer all summary cases to the bankruptcy judge; transfer judicial cases to the bankruptcy judge when no one complains; and reserve judicial cases to the district court when the parties request it as here. This is the obvious intent of 28 U.S.C. § 157; and judicial decisions are erroneous which hold that Congress intended to make all former legal actions by a trustee for monetary damages for preferential of voluntary conveyances to be equitable summary pro-

ceedings. Often equitable proceedings to avoid transfers are judicial; such as a suit to set aside a recorded deed required the trustee to implead all parties with an interest in the land under state law.

Under a normal reading of the language of the constitution, it is clear the proceeding against the Perkinsons is judicial and belongs with an Article 111 court. As explained in *Northern Pipeline Co. v. Marathon Pipe Line, supra,* the problem is that over the years, Congress has established other tribunals to hear certain cases; and while these would appear to be infringing judicial tribunals, they have been sanctioned as Article 1 courts. After years of recognizing Article 1 courts, it is now difficult to overrule prior decisions upholding such infringement against the judiciary. The plurality decision

attempted to distinguish between Article 1 and Article 111 functions. Prior decisions make the distinguishing definition about as confusing as the definition of pornography where the judge now says "I can not define it but I know it when I see it." When a citizen is sued for money, he knows it is a judicial proceeding even if he can not define it.

Reference to an Article 1 judge as a "fact finder" for the judiciary is not available here because the fact finding must be a jury. Reference to an Article 1 judge to determine federally granted compensatory rights is not involved. While possibly 28 U.S.C. § 157 may be an attempt for the bankruptcy judges to do indirectly what this Court said they could not do directly, the Perkinsons do not contend 28 U.S.C. § 157 is unconstitutional because it can certainly

be interpreted to require the district judge and not the bankruptcy judge to preside at the trial of the adversary proceeding by the Trustee against the Perkinsons hereby involved.

1X. CONCLUSION

By its decision on March 2, 1988 set forth in the appendix denying the Petitioners herein right of trial by jury and right of trial in the district court instead of the bankruptcy court, the United States Court of Appeals for the Fourth Circuit decided an important issue of federal law contrary to the decisions of this Court and contrary to the decisions od other federal courts. Accordingly a writ of certiorari should be granted to review said decision and answer these important federal questions.

Respectfully submitted,

DIANA M. PERKINSON and
FRANK N. PERKINSON, JR.
t/a PERKINSON & PERKINSON,
a Partnership

By _____
Their Counsel

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, Virginia 24011
Telephone: (703) 345-0946
Counsel for Petitioners

X. PROOF OF FILING AND SERVICES

I, John H. Kennett, Jr., counsel for the Petitioners and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 22nd day of April, 1988, I filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of same together with the filing fee in a duly addressed envelope by first class mail with postage thereon prepaid addressed to Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, Northeast, Washington, D.C. 20543; and I also served a true copy of the foregoing petition on the Respondents by mailing three copies of same in a duly addressed envelope by first class mail with postage

thereon prepaid addressed to Donald W. Huffman, Esquire, 126 Church Avenue, Southwest, Roanoke, Virginia 24011.

John H. Kennett

Counsel for Petitioners

STATE OF VIRGINIA,

CITY OF ROANOKE,TO-WIT:

The foregoing proof of filing and service was subscribed and sworn to before me by John H. Kennett, Jr. this 22 day of April, 1988

My commission expires: Sept. 30, 1988

Notary Public

XI. APPENDIX

The appendix consists of:

(1) Copy of the opinion of the United States Court of Appeals for the Fourth Circuit on March 2, 1988 whose decision is sought to be reviewed. Page A-1.

(2) Copy of an order on August 27, 1985 of the United States District Court

for the Western District of Virginia at Lynchburg denying jury trial and remanding case to bankruptcy court. Page A-84.

(3) Pertinent portions of the text of constitutional and statutory provisions cited in Part Vl of the petition. Page A-86.

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2311

In Re: Billy H. Harbour,
Debtor.

Donald W. Huffman, Trustee and Bluefield Holding Company, — Plaintiffs-Appellees

versus

Diana M. Perkinson & Frank N. Perkinson, Jr., t/a Perkinson & Perkinson, a Partnership, — Defendants-Appellants

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Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. Jackson L. Kiser, United States District Judge. (C/A 85-00420L).

Argued: May 6, 1986 Decided: March 2, 1988

Before WIDENER, SPROUSE, AND CHAPMAN, Circuit Judges.

John H. Kennett for Appellant Frank N. Perkinson, Jr. (Arthur P. Strickland; Strickland & Rogers on brief) for Appellant Diana M. Perkinson; Donald W. Huffman (Bird, Kinder & Huffman on brief) for Appellees.

SPROUSE, Circuit Judge:

Diana M. Perkinson and her husband, Frank N. Perkinson, Jr., appeal from the district court's order denying their demand for a jury trial in this action against them by Donald W. Huffman, trustee in bankruptcy for the estate of Billy H. Harbour, and Bluefield Holding Company (hereafter Huffman or the trustee). The trustee seeks to recover funds that he alleges Diana Perkinson received from Harbour in transactions voidable as fraudulent transfers and illegal preferences under federal bankruptcy laws, and as voluntary conveyances voidable under Virginia state law. 11 U.S.C. §§ 543, 547, 548; Va. Code § 55-81.

Harbour's creditors placed him in involuntary bankruptcy on February 11, 1982.[1]

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[1] 11 U.S.C. § 303. Chapter 11 is codified at 11 U.S.C. § 1101 et seq. The bankruptcy was converted to a Chapter 7 proceeding on September 13, 1983. 11 U.S.C. § 701 et seq.

Harbour remained as the debtor in possession during the Chapter 11 proceedings until the court appointed Huffman trustee on February 8, 1983. On October 21, 1984, Huffman as trustee initiated this action to recover payments Harbour made to Diana Perkinson allegedly as legal fees. The trustee asserts Diana Perkinson received payments totalling $125,713.49 either within one year prior to Harbour being placed in bankruptcy or while he remained as debtor in possession.[2] Diana Perkinson had represented Harbour and Bluefield Holding Company, a company wholly owned by Harbour, and had served as Secretary and registered agent of the company. Frank Perkinson was joined as a co-defendant

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[2]Huffman filed a second complaint against the Perkinsons on February 7, 1985, seeking to recover an additional $144,060.81. This sum includes $24,500 as the value of diamond earrings, a Rolex ring and wristwatch, and clothing Harbour allegedly gave

in the trustee's action because he and his wife practiced law as a partnership, and she had deposited the disputed funds into their joint account.

The district court denied the Perkinsons' motion for a jury trial but certified its order for interlocutory appeal. 28 U.S.C. § 1292(b). We granted the Perkinsons' petition for interlocutory appeal. The merits of the trustee's attempt to avoid the transfers and obtain the funds, of course, have not been determined. The issues on appeal involve the jurisdiction of the bankruptcy court and whether the Perkinsons are constitutionally or statutorily entitled to a jury trial to determine the parties'

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2 (Cont.) Diana Perkinson. The proceedings in that action have been stayed pending the outcome in this appeal of the district court's denial of the jury trial motion made pursuant to the first complaint.

respective rights under 11 U.S.C. §§ 543, 547, and 548 and Va. Code § 55-81.

The Perkinsons first assert, in effect, that the funds Mrs. Perkinson received from Harbour were for fees earned under Virginia law so that the federal bankruptcy court has no jurisdiction to entertain the trustee's action, Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 L.Ed.2d 598, 102 S. Ct. 2858 (1982). They also assert that both the seventh amendment to the United States Constitution and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (hereafter the 1984 Bankruptcy act or the 1984 Act) grant them a right to a trial by jury.[3] We hold

[3]The Perkinsons inexplicably cite both the 1978 and 1984 Acts. The 1984 Act controls the outcome of this case, however. Section 122 of the 1984 Act provides that "amendments made by this title [title I--Bankruptcy Jurisdiction and Procedure]

3 (Cont.) shall take effect on the date of the enactment of this Act [July 10, 1984]," with certain exceptions. Pub. L. No. 98-353, § 122(a), 98 Stat. 333, 346 (1984). Section 553(a) provides that "the amendments made by this title [title III--Amendments to Title 11 of the United States Code] shall become effective to cases filed 90 days after the date of enactment of this Act." Pub. L. No. 98-353, § 553(a), 98 Stat. 333, 392 (1984). We have held that the jurisdictional provisions of the 1984 Act apply to any case pending on July 10, 1984. Creasy v. Coleman Furniture Corp., 763 F.2d 656, 660 (4th Cir. 1985); see also In re Hudson Shipbuilders, Inc., 794 F.2d 1051, 1054 n.4 (5th Cir. 1986); In re Castlerock Properties, 781 F.2d 159, 161 (9th Cir. 1986); Carlton v. Baww, Inc., 751 F.2d 781, 787 n.6 (5th Cir. 1985). Most, if not all, issues involved in this appeal relate to jurisdictional disputes that had not arisen or were pending on July 10, 1984. The only non-jurisdictional matter relates to the possible application of 11 U.S.C. § 544, which became effective for cases filed 90 days after July 10, 1984, or October 9, 1984. Here, although the petition was filed in February 1982, the trustee's complaint was filed October 12, 1984. In any event, the provisions of § 544 are essentially the same under both the 1978 and 1984 Acts.

that the bankruptcy court has jurisdiction over these actions and that neither the seventh amendment nor the 1984 Act require a jury trial. We discuss seriatim the jurisdiction issue, the seventh amendment question and whether, apart from the constitutional requirements, the 1984 Act entitles the Perkinsons to a jury trial in the trustee's action against them.

The Perkinsons advance three related arguments in support of their contention that the bankruptcy court has no jurisdiction over the trustee's actions. First, they assert that under Northern Pipeline a non-Article III bankruptcy judge has no jurisdiction over the trustee's avoidance action based on alleged fraudulent or preferential transfers because the actions involve only rights created by the substantive law of Virginia. They assert that any action

involving the sums paid to Mrs. Perkinson is not a "case under Title 11," did not "arise under Title 11;" nor did the issues "arise in a case under Title 11." 28 U.S.C. § 1334.[4] They argue instead that, at most, the issues in this case only "relate to a case under Title 11" and possess the same characteristics as Northern Pipeline's suit against Marathon Pipe Line, which could not be tried by a bankruptcy judge. Second, they argue that if Congress intended to include actions to litigate rights created

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[4] Section 101 of the 1984 Act provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district

by state substantive law as "core" proceedings, section 157(b) of the 1984 Act violates the principles of Northern Pipeline.[5] Third, the Perkinsons stress

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4(Cont.) courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334.

[5]Section 104 of the 1984 Act, codified at 28 U.S.C. § 157 (hereafter § 157 of the 1984 Act), provides:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

that Harbour transferred some of the property more than a year prior to the filing of the bankruptcy petition and, as to those transfers, the Virginia avoidance law, and not the federal bankruptcy law, provides the essential procedural mechanism under which the trustee can proceed.[6] Assuming these

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5(Cont.)
Section 157(b)(2) provides as follows:

> Core proceedings include, but are not limited to--
>
> ...
>
> (F) proceedings to determine, avoid, or recover preferences;
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> ...
>
> (H) proceedings to determine, avoid, or recover fraudulent conveyances....

[6]The trustee filed two actions against the Perkinsons. See supra note 2. The first action sought to set aside transfers of money to Diana Perkinson for legal fees, and this appeal involves only the district court's denial of a jury trial in that action. The complaint reflects that all of the transfers were made within one year of bankruptcy. In view of the record's sparsity and the Perkinsons' contentions on appeal, however, we will assume that some transfers were made more than one year prior to bankruptcy, but within a time frame permitting an action under § 55-81 of the Virginia Code.

factual contentions are correct, we think neither of these classes of transfers are within the proscription of the Supreme Court's holding in Northern Pipeline.

Initially, the Perkinsons maintain that their right to legal fees was created by the substantive law of Virginia, so the trustee's attack of that right can only be determined in a state forum or by an Article III judge. They urge that the trustee's action is similar to Northern Pipeline's action against Marathon, which the Supreme Court reviewed in Northern Pipeline. The trustee, on the other hand, insists that his action is a "core" proceeding "arising in a case under title 11" that, under Northern Pipeline, can be determined by a bankruptcy judge.

In Northern Pipeline, the Supreme Court held that a jurisdictional provision of the Bankruptcy Reform Act of 1978, Pub.

L. No. 95-598, 92 Stat. 2549, violated the separation of powers doctrine by conferring Article III judicial power on non-Article III bankruptcy judges with respect to proceedings that included those only "related to cases under Title 11." The Court found no constitutional objections to the congressional exercise of its Article I § 8 bankruptcy powers in assigning jurisdiction over traditional bankruptcy matters to bankruptcy courts. Although not so stated by the Court, those proceedings presumably were matters "arising under title 11, or arising in ... a case under title 11." 28 U.S.C. § 1334 (replacing 28 U.S.C. § 1471); see 1 Collier on Bankruptcy ¶ 3.01[1][c][ii]-[iv] (15th ed. 1987) (hereafter Collier). It held, however, that a contract action based on state law must be resolved in a state court or by an Article III judge. See Thomas v.

Union Carbide Agricultrual Products Co., 105 S. Ct. 3325, 3334-35 (1985).

Our first task is to identify the jurisdictional restructions applied to bankruptcy courts in Northern Pipeline and to determine if the trustee's action against the Perkinsons comes within them. In the aftermath of Northern Pipeline, the limitations encompassed in the phrase "related to cases under title 11" are not entirely clear. It generally has been held, however, that the Northern Pipeline restriction is limited to actions by the bankrupt or his trustee over the disposition of state-created substantive rights.[7]

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[7] Northern Pipeline, 458 U.S. at 87 n.40; see also id. at 92 (Burger, C.J., dissenting); 1 Collier ¶ 3.01[1][c][iv] (15th ed.); Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325, 3334-35 (1985); 1616 Reminc Limited Partnership v. Atchison & Keller, 704 F.2d 1313, 1318 n.15 (4th Cir. 1983).

As Justice Rehnquist said in his concurring opinion to Northern Pipeline:

> [T]he lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law .... There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law.

458 U.S. at 90 (Rehnquist, J., concurring).

In his dissent, Chief Justice Burger added:

> [T]he Court's holding is limited to the proposition ... that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Art. III court" if it is to be heard by any court or agency of the United States.

Id. at 92 (Burger, C.J., dissenting).

If there was any question that these statements reflect the limits of Northern

Pipeline's holding, it was dispelled by the Court's decision in Thomas v. Union Carbide Agriculture Products Co., 105 S. Ct. at 3334-35, in which the Court noted:

> [Our] holding in [Northern Pipeline] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. (Citations omitted).

Here, Harbour, the bankrupt, transferred a large amount of money to Mrs. Perkinson. The dispute between the trustee and Mrs. Perkinson over the right to this money does not depend upon the substantive law of Virginia, rather it is governed by federal bankruptcy laws. It is a dispute involving the restructuring of debtor-creditor relations. As the Northern Pipeline plurality opinion noted:

> the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.

458 U.S. at 71.

In this case, the transfers that were made within a year prior to the filing of Harbour's bankruptcy petition[8] present

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[8]Under 11 U.S.C. § 547(b), the trustee can avoid as preferences certain transfers made within 90 days before the bankruptcy petition is filed, or one year if the transferee is an insider. Mrs. Perkinson was Secretary of Bluefield Holding Company, so for purposes of this appeal we assume, without deciding, that she was an insider. Section 548(a) grants the trustee the authority to avoid fraudulent transfers made by the debtor within one year before the bankruptcy petition was filed. Without considering the merits of the trustee's attempt to avoid the transfers, we consider them as two groups; those made within one year prior to the filing of Harbour's petition and those made more than one year prior to it.

very little analytical difficulty; actions to recover them are specifically identified as "core" matters in section 157(b)(2)(F) ("proceedings to determine, avoid, or recover preferences") and (H) ("proceedings to determine, avoid, or recover fraudulent conveyances") of the 1984 Act. Mrs. Perkinson claims she earned the money transferred to her as legal fees. Her contractual right to receive the funds is no doubt a right that existed by virtue of Virginia law. It does not belong, however, to the same species of legal rights involved in Northern Pipeline. Northern Pipeline's action was based on its claim for breach of contract and warranty--a traditional common law action based on no federal rule of decision. The trustee's action is a core proceeding arising under title 11,

or arising in a case under title 11,[9] in

[9] See 1 Collier ¶ 3.01[2][b][ii] (15th ed.) (equating the jurisdictional provision declared invalid in Northern Pipeline to the provisions in the 1984 Act treating proceedings relating to a case under title 11 and stating that under the 1984 Act "there is no such thing as a core matter which is only 'related to' cases under title 11"). See also Taggart, The New Bankruptcy Court System, 59 Am. Bankr. L.J. 231, 241-42 (1985) (hereafter Taggart), to the effect that the drafters of the 1984 Act dealt with Northern Pipeline by omitting matters only "related to a case under the Code" from the matters over which a bankruptcy judge could exercise jurisdiction. Compare King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L. Rev. 675, 689 (1985) (hereafter King). The author said:

> One could argue that [a case only related to cases arising under title 11] would be a core proceeding. It certainly affects the liquidation of the assets of the estate. The Chapter 11 debtor in NorthernPipeline sued for breach of contract. That cause of action (a chose in action) was an asset of the estate and had to be liquidated... It is therefore likely that the proceeding also affected the adjustment of the debtor-creditor relationship. If the breach of contract action

which Congress gave bankruptcy courts *in personam* jurisdiction over Mrs. Perkinson and summary jurisdiction to decide this dispute between her and the trustee.

In their brief, however, the Perkinsons make the additional argument that some of the involved funds were paid to Mrs. Perkinson more than one year prior

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9(Cont.) would be core proceeding under the 1984 amendments, Congress has not complied with the Supreme Court's mandate and has enacted a constitutionally invalid statute.

The author also listed in note 44 a number of bankruptcy court holdings indicating that the distinction between these categories of bankruptcy matters is a difficult one to make. *But cf.* Taggart, at 947 *et seq.*; Kamp, *Court Structure Under the Bankruptcy Code*, 90 Com. L.J. 203, 207 (1985).

to Harbour's bankruptcy and the trustee can only recover those funds under section 55-81 of the Virginia Code.[10] They contend that actions based solely on Virginia's avoidance law only peripherally relate to the administration of Harbour's bankruptcy and are the equivalent of Northern Pipeline's action against Marathon. We are unable to

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[10] Va. Code § 55-81 provides:

> Voluntary gifts, etc., void as to prior creditors.--Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.

determine from the record if, in fact, some funds were paid to her beyond the controlling bankruptcy time frame. Assuming her factual contentions are correct, however, we are not persuaded that the trustee's recovery under section 55-81 of the Virginia Code should be treated differently from recovery under 11 U.S.C. §§ 547 and 548 of funds transferred within one year of bankruptcy.

First, the language of section 157(b)(2)(F) and (H) does not limit the proceedings to avoid preferences and fraudulent transfers only to those proceedings authorized by sections 547 and 548 of the Bankruptcy Code. It embraces state avoidance laws and includes them as part of the bankruptcy proceedings. 1 Collier ¶ 3.01[2][b][ii] (15th ed.); Taggart, at 247. The legislative history of section 157(b) certainly demonstrates that this was the

intent of Congress.[11] Moreover, section 544(b) gives trustees in bankruptcy the same authority to avoid transfers that an unsecured debtor would have under state law.[12]

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[11]Representative Kastenmeier, who introduced the legislation containing § 157, had this to say:

> In this respect, State law rights arising in core bankruptcy proceedings are functionally equivalent to congressionally created rights, because Congress has the power to modify State law rights in bankruptcy proceedings. Unlike the States, Congress may impair the obligations of contracts through the bankruptcy clause. Indeed, the very purpose of bankruptcy is to modify the rights of the debtors and creditors, and the bankruptcy code authorizes the bankruptcy court to abrogate or modify State-created obligations in many ways.

130 Cog. Rec. H1110 (daily ed. March 20, 1984).

[12]Section 544(b) provides:

> (b) The trustee may avoid any transfer of an interest of the debtor in propety or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding

In Carlton v. Baww, Inc., 751 F.2d 781 (5th Cir. 1985), for example, the Fifth Circuit held that an action by the trustee to avoid a fraudulent conveyance under state law, as authorized by section 544(b), is a proceeding arising under title 11 and the district court (and presumably the bankruptcy court) has jurisdiction over the action.[13]

12(Cont.)
> an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b).

[13] But see King, at 693, where the author states:

> It is difficult, if not impossible, to perceive any conceptual difference between the trustee's use of an individual creditor's right to sue under section 544(b) and the debtor suing for breach of contract as it did in Northern Pipeline.

Finally, section 157(b)(3) provides that "a determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state law." 28 U.S.C. § 157(b)(3). In short, the portion of this dispute that must be resolved by the bankruptcy court's interpretation of Va. Code § 55-81 likewise falls within the dispute resolution mechanism of section 157(b). This dispute does not involve the type of state-created substantive rights that NorthernPipeline rules must be resolved by article III judges.[14]

II.

The Perkinsons next contend that the seventh amendment of the United States

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[14] But see id., at 689, where the author postulates that some Northern Pipeline-type "related to" matters might be core proceedings under § 157 and, if so, the section would be unconstitutional as violating the principles of Northern Pipeline.

Constitution guarantees them a jury trial.

The seventh amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The nature of the seventh amendment inquiry has been so thoroughly and universally stated that extensive case citation is not necessary.[15] Simply stated, the essence of our seventh amendment inquiry is whether

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[15]As one noted commentator remarks:

> The Seventh Amendment preserved the right of trial by jury "in suits at common law." Inevitably this calls for some historical inquiry. If the issue in the context in which it arises would have been heard at common law in 1791, when the Seventh Amendment was adopted, or, more accurately, in 1938 when law and equity were merged, it is now triable of right to a jury. There is no right to jury trial if viewed historically the issue would have been

the underlying issues to be ascertained and determined in this proceeding are legal or equitable. If the action is to enforce legal rights, then it falls within the seventh amendment grant of a right to a trial by jury. Curtis v. Loether, 415 U.S. 189, 195 (1974); see also Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). In deciding this question, courts have traditionally employed a historical test looking to the custom that existed with respect to the action under English common law at the time the seventh amendment was adopted.

15(Cont.) tried in courts of equity or if otherwise it would have been tried without a jury.

Wright & Miller, Federal Practice and Procedure, § 2302, at 14-15 (1971) (footnotes omitted).

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Damsky v. Zavatt, 289 F.2d 46, 48-51 (2d Cir. 1961). See also Ross v. Bernhard, 396 U.S. at 533-34.[16] Our analytical chore, however, has been abbreviated by the Supreme Court's decisions in Schoenthal v. Irving Trust Co., 287 U.S. 93 (1932), and Katchen v. Landy, 382 U.S. 323 (1966), and the congressional enactment of the Bankruptcy Act of 1984. Our inquiry is

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[16] Since the merger of law and equity in 1938, Fed. R. Civ. P. 2, however, the Supreme Court has not adhered rigidly to a historical test. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 351 (1970). See also Whitlock v. Hause, 694 F.2d 861, 863 (1st Cir. 1982). 5 Moore's Federal Practice ¶ 38.09(5-4) (2d ed. 1982); Wright and Miller, Federal Practice and Procedure, §2302, at 18 (1971). Compare Tull v. United States, 55 U.S.L.W. 4571 (April 28, 1987), where Justice Brennan, in the majority opinion, described one important approach to resolving the question of whether an issue is legal or equitable for seventh amendment purposes:

> Our search is for a single historical analogue, taking into consideration the nature of the cause of action and

directed at determining whether the underlying issues in this case are legal or equitable, but we focus on the Supreme Court's decision in Schoenthal, Katchen and Congress' enactment of the 1984 Act.

The universal rule under the Bankruptcy Act of 1898[17] and it predecessors[18] had been

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16(Cont.) the remedy as two important factors.

Id. at 4574 (citing Pernell v. Southall Realty, 416 U.S. 363, 375 (1974), and Curtis, 415 U.S. at 195-96.

17 30 Stat. 544 (1898).

18 Congress enacted the first national bankruptcy act in 1800. 2 Stat. 19-21. It was to be in effect for five years, but was repealed in 1803. Congress enacted a second act, the Bankruptcy Act of 1841, 5 Stat. 440, but repealed it in 1843. 1 Collier ¶ 0.04 (14th ed.). Financial stress following the Civil War prompted the Bankruptcy Act of 1867, 14 Stat. 517, which was repealed in 1878. Id. at ¶ 0.05. Congress ultimately enacted the Bankruptcy Act of 1898, which remained in effect until superseded by the Bankruptcy Reform Act of 1978. The 1898 Act was amended extensively by the Bankruptcy Act of 1938, commonly known as the Chandler Act, id. at ¶ 0.07, and was

that actions to set aside the bankrupt's transfers as fraudulent or preferential were actions outside the bankruptcy proceeding and were to be resolved by plenary proceedings in a different forum.[19] Schoenthal, the linchpin case recognizing that rule in the seventh amendment context,[20]

18(Cont.) also amended in 1903, 1906, 1910, 1914, 1916, 1917, 1922, 1926, 1932, 1933, 1934 (on four occasions), 1935 (on five occasions), 1936 (on four occasions), 1937 (on two occasions), 1938, 1939, and 1946. Id. at ¶¶ 0.06 n.6, 0.08, 0.09.

19 1 Collier ¶ 3.01[7][b][i] (15th ed.).

20 In Schoenthal, the Court actually construed a provision of the judicial code, 28 U.S.C. § 384, not the seventh amendment. The Court noted, however, that the provision "guard[s] the right of trial by jury preserved by the Seventh Amendment...." 287 U.S. at 94.

unequivocally had determined that actions such as this one were to be considered outside the bankruptcy proceedings, were legal in nature and were under the aegis of the seventh amendment. As in Schoenthal, the Court in Katchen considered (under the Bankruptcy Act of 1898) an action similar to the one we review. It held emphatically that bankruptcy proceedings were equitable. Although the case cast some doubt on the vitality of Schoenthal, the Court refrained from overruling it. The 1984 Act, by designating actions to avoid preferences and fraudulent transfers as core proceedings, mandated that these actions be resolved within the bankruptcy forum by the bankruptcy judge, a legislative mandate that has a direct bearing on the seventh amendment jury question.[21] The combined

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[21] See In re O'Bannon, 49 B.R. 763, where the bankruptcy court says:

effect of judicial and legislative actions, we think, is to cast the trustee's claim against the Perkinsons as a bankruptcy proceeding entirely within the traditionally equitable bankruptcy forum[22] and free of the seventh amendment's requirement that in all suits at common law the right to trial by jury shall be preserved.

21(Cont.) If Katchen v. Landy stands for the proposition that cases with a clear bankruptcy focus do not involve a Seventh Amendment right to jury, then parties in core matters would have no constitutional jury rights.

(emphasis in original).

22 The early English bankruptcy statutes were administered through the Court of Chancery at the direction of the Lord Chancellor. For a discussion of those statutes see, Jones, The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period, 69 Transactions of the Am. Phil. Soc'y, Part 3

In Schoenthal, the Court stated that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." 287 U.S. at 94-95. It said, therefore, that "[t]he question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendants depends upon the facts stated in the bill." Id. at 95. The Court referred both to the historical English practice

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22(Cont.) (1979); Levinthal, The Early History of English Bankruptcy, 67 U. Pa. L. Rev. 1 (1919). For a comparison of English and American law and procedures governing the granting of discharges in a historical and modern context, which demonstrates the equitable nature of the proceedings, see Bashkoff, Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings, 131 U. Pa. L. Rev. 69 (1982).

and to the then current American practice in suits by bankrupts to recover preferential payments.[23] Although Schoenthal dealt with suits to recover preferences, there is little doubt that, under the 1898 Act, the same reasoning would have applied with equal force to an action by a trustee to set aside the transfer as a fraudulent conveyance.

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[23] The 1898 Act, as amended when Schoenthal was decided, provided two types of jurisdiction. Section 2 of the Act conferred upon the courts of bankruptcy original jurisdiction at law and equity over proceedings under the Act, which included administrative matters, disputes over property in the actual or constructive property of the court, and disputes over the bankrupt's discharge. This was considered summary jurisdiction. Section 23 governed the district court's plenary jurisdiction over controversies at law and in equity. See In re Boss-Linco Lines, Inc., 55 B.R. 299, 302-04 (Bankr. W.D.N.Y. 1985). See infra note 25.

A noted commentator has stated:

> It follows that whether the trustee's suit should be at law or in equity is to be judged by the same standards that are applied to any other owner of property which is wrongfully withheld. If the subject matter is a chattel, and is still in the grantee's possession, an action in trover or replevin would be the trustee's remedy; and if the fraudlent transfer was of cash, the trustee's action would be for money had and received. Such actions at law are as available to the trustee today as they were in the English courts of long ago.

Glenn, Fraudulent Conveyances and Preferences, § 98 (1940) (footnote omitted). He went on to say with reference to the Supreme Court's decision in Schoenthal:

> The actual decision was that in the case of a preference the trustee's suit must be at law unless he needs equitable relief for any reason as above suggested. But what is true of a preference, which essentially is an offense against a bankruptcy law as such, is a fortiori true of a fraudulent conveyance, and hence the Supreme Court's decision should be accepted as final for all purposes.

Id. It seems clear then that under the doctrine announced in Schoenthal and at least until the Supreme Court's decision in Katchen, adverse claimants like Perkinsons would have had a right to a jury trial in a trustee's action to avoid and recover the fraudulent or preferential conveyance.

Katchen was decided in 1966, thirty-four years after Schoenthal. In it, the Supreme Court reviewed a holding that a bankruptcy court had summary jurisdiction to order a creditor to surrender property that the bankrupt had preferentially transferred to him. The Court upheld the summary jurisdiction of the bankruptcy court and emphasized that the creditor had subjected himself to the jurisdiction of the bankruptcy court by filing a claim in the bankruptcy proceeding. Justice White's opinion stated, with great emphasis, that

bankruptcy courts are "essentially courts of equity" and "characteristically proceed in summary fashion . . . ." 382 U.S. at 327 (citations omitted).

The Court also stated:

> When Congress enacted general revisions of the bankruptcy laws in 1898 and 1938, it gave "special attention to the subject of making [the bankruptcy laws] inexpensive in [their] administration." Moreover, this Court has long recognized that a chief purpose of the bankruptcy laws is "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period," and that provision for summary disposition, "without regard to usual modes of trial attended by some necessary delay," is one of the means chosen by Congress to effectuate that purpose.

Id. at 328-29 (citations omitted).

The Katchen decision, of course, addressed an action by a trustee against an adverse claimant who had filed a claim in the bankruptcy proceeding and thus submitted to the jurisdiction of the

bankruptcy court. The Court stopped short of overruling Schoenthal, however, stating:

> But although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity.

Id. at 336 (citation omitted).

If this language connoted a reticence by the Court to overrule Schoenthal,[24] its reluctance is understandable.

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[24] Some writers were of the opinion that on the authority of Katchen, even before Congress passed the 1984 Act, there was no seventh amendment right to a jury trial in any bankruptcy proceedings. 1 Collier ¶ 3.01[7][b][i] at 3-86 (15th ed.). For cases holding to the contrary, see id. at 3-87 n.178.

Schoenthal was based on solid precedent and historical judicial treatment of actions by debtors or trustees to set aside preferential transfers.[25] Short of congressional action

[25] Firmly implanted in the structure of all the congressional enactments listed in note 18 was the longstanding English and American principle that actions to avoid preferential and fraudulent conveyances were not a part of the proceedings in bankruptcy, but were part of controversies arising out of it.

The Bankruptcy Acts of 1841 and 1867 gave federal district courts concurrent jurisdiction with state courts to conduct plenary trials involving suits by the trustee (assignee) against an adverse third party. Congress deleted that provision in the original Act of 1898, but reinserted it by amendments in 1903 and 1910. Bardes v. First National Bank of Hawarden, 178 U.S. 524 (1900). See Schumacher v. Beeler, 293 U.S. 367 (1934) (discussing federal court jurisdiction following the 1903 and 1910 amendments). Each bankruptcy act until the 1978 Act, however, provided that actions to avoid preferential and fraudulent conveyances were to be tried outside the bankruptcy forum.

As explained by the Court's historical analysis in Bardes, that rule was strictly a creature of various congressional acts. Prior to the 1903

25(Cont.)
amendment, section 23(b) of the 1898 Act provided:

> (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt...might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

In reviewing the jurisdiction of federal trial courts to entertain, in a bankruptcy proceeding, an action to set aside preferential or fraudulent transfers, the Court in Bardes said that under the 1867 Act federal trial courts had two types of jurisdiction in bankruptcy matters:

> First, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy ... ending in the distribution of assets amongst the creditors, and the discharge ... of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him.

Bardes, 178 U.S. at 531 (quoting Lathrop v. Drake, 91 U.S. 516 (1875)).

The Court went on to note that in its original form, the 1898 Act omitted the second type of jurisdiction, and only state courts could at that time entertain actions to set aside preferences or fraudulent

dramatically altering the structure of bankruptcy administration that was

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25(Cont.) conveyances.

> Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared.

Id. at 533.

The Court also said:

> It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person who now claimed it adversely to the assignee could only be enforced by a plenary suit at law or in equity, under the 2d section of the act of 1867; and not by summary proceedings under the 1st section thereof....

Id. at 532.

> Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words "at law," in the opening sentence ... may have been inserted to meet clause 4,

established in the early bankruptcy acts, it seems likely that the principle announced in Schoenthal would have remained a permanent fixture in the law of bankruptcy.

25(Cont.) authorizing the trial and punishment of offenses....

Id. at 535.

The Court, again speaking of the 1867 jurisdiction before it was temporarily removed by Congress in the 1898 Act, said:

> The 1st clause provides that "the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy" (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

An essential key to the Court's ruling in Schoenthal that suits to recover preferences were legal in nature was the well-founded concept that Congress intended actions against third parties

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[25](Cont.)

Id. at 536. In its § 23 analysis, the Court went on to say that an adverse third party claimant "shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy." Id. See also Schumacher v. Beeler, 293 U.S. 367 (1934) (discussing the effect of the 1903 and 1910 amendments on federal court jurisdiction over suits by the trustee against adverse third parties to recover property as preferences or fraudulent conveyances).

in general and avoidance actions in particular not to be part of bankruptcy proceedings.[26] Congress dramatically changed this rule, however, in the 1984 Act. It directed that bankruptcy courts may now hear, determine, and enter orders and judgments in all proceedings under Title 11, and all core proceedings arising under Title 11 or arising in a case under Title 11. 28 U.S.C. § 157(b)(1). From the unmistakable language of the Act, it is manifest that Congress intended bankruptcy courts to have jurisdiction over "proceedings to determine, avoid, or recover preferences," 11 U.S.C. § 157(b)(2)(F), and "proceedings to determine, avoid, or recover fradulent conveyances," 11 U.S.C. § 157(b)(2)(H).

Relying on Schoenthal and precendent involving common law actions to avoid transfers, the Perkinsons contend, however,

that

> [i]f the bankruptcy statutes must be interpreted to categorize the adversary

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26 Types of bankruptcy actions that the bankruptcy court could resolve by summary disposition as " bankruptcy proceedings" have varied in the different acts. In Bardes, the Court set forth these categories and noted that the 1898 Act differed from the 1867 Act in that "[i]t specifies in greater detail matters which are, in the strictest sense, proceedings in bankruptcy." Bardes, 178 U.S. at 534. The 1898 Act specified nineteen such types of actions, including the appointing of receivers and trustees; authorizing them to conduct the bankrupt's business; exercising administrative control over cases; extraditing bankrupts; transferring cases to other bankruptcy courts; deciding substantive issues in some proceedings (such as adjudging persons to be bankrupt); allowing or disallowing claims; causing the estate to be collected and distributed to creditors; reviewing findings of the referee; discharging the bankrupt; and enforcing its orders through contempt powers. 1898 Act § 2. This jurisdiction has varied. For a summary of modern jurisdiction, see Countryman, Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process, 22 Harv. J. on Legis. 1, 35 (1985).

> suits by the Trustee against the Perkinsons as "core" proceedings and if the bankruptcy statutes must further be interpreted to require core proceedings be tried by the bankruptcy judge and if the Constitution is interpreted to prohibit bankruptcy judges from conducting jury trials, then the appropriate provisions of 28 U.S.C. § 157 are unconstitutional by denying the Perkinsons the right of trial by jury.

We disagree.

Schoenthal went no further than to hold that a preferential transfer action under the 1898 Act must be tried in a non-bankruptcy forum and that its characterization as being either legal or equitable in the seventh amendment context must, therefore, be determined independently of the bankruptcy proceeding--i.e., its legal or equitable nature must be judged as if it were a unitary common law action to avoid a transfer without any connection to a

bankruptcy proceeding.[27] It based its holding, however, on its recognition that avoidance actions were not part of the bankruptcy proceedings and, when judged under the practice of litigating those cases, were considered to be legal in nature.[28] The Court reasserted, moreover, the convential jurisprudence that bankruptcy proceedings are equitable. Thirty-four years later, Katchen reasserted with even greater force the ancient principle that bankruptcy proceedings are equitable.

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[27] See supra note 25.

[28] The fact that they were not part of the bankruptcy proceedings at any given time, however, was simply dependent on federal statutory law. 1 Collier ¶ 3.01 [2][b][iii] at 3-36.1 (15th ed.). See also supra note 25.

More importantly for our purposes, Katchen explained the somewhat subtle, but imminently logical, reasoning of seventh amendment jurisprudence relating to bankruptcy controversies. Justice White carefully explained how actions that are, and always have been considered to be, legal for seventh amendment or other purposes, become equitable when merged into bankruptcy proceedings.[29]

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[29]The successive bankruptcy statutes themselves have changed actions from plenary to summary proceedings. For example, under § 58 of the Bankruptcy Act of 1800, claims of creditors could be tried before a jury. 2 Stat. 19-21, § 58, reprinted in 10 Collier, Appendix at 1736 (14th ed). Under § 1 of the Bankruptcy Act of 1841, debtors who were declared a bankrupt involuntarily could petition for a jury trial. Id. at 1738. Under § 4 of that Act, bankrupts who did not receive a full discharge could demand a jury trial. As in §58 of the 1800 Act, a jury trial was available under § 7 of the 1841 Act "to ascertain the validity and amount of ... debts or other claims" against the estate. Id. at 1743. Under

29(Cont.) §41 of the Bankruptcy Act of of 1867, the debtor retained the right to demand a jury trial in an involuntary bankruptcy proceeding to determine if an act of bankruptcy had been committed. Id. at 1773-74. However, there was no provision for jury trials over the grant of discharges or allowance of claims. Section 2 of the 1898 Act specifically included in its grant of jurisdiction to courts of bankruptcy the authority to adjudge persons bankrupt, to allow or disallow claims against the estate, and to discharge (or not) bankrupts. These matters were within the bankruptcy proceedings, which would be summary. Id. at 1785-86. Section 19, however, retained the right to a jury trial with respect to the question of insolvency in an involuntary proceeding. Id. at 1797. Between the 1800 and 1898 Act, therefore, the boundaries of plenary versus summary jurisdiction were altered by legislative enactments as formerly plenary proceedings were changed to summary proceedings.

The Chandler Act of 1938, 52 Stat. 840 (1938), further increased the summary jurisdiction of the bankruptcy court. Section 50n provided for summary proceedings in suits over breach of an obligation of a bond furnished pursuant to the Act.

Section 571 provided for summary jurisdiction over actions by the trustee to recover excess payments on claims or payments made on disallowed claims.

> So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods.

382 U.S. at 337 (quoting Barton v. Barbour, 104 U.S. 126, 134 (1881)).

29(Cont.) The 1938 Act also provided for summary jurisdiction over a trustee's suit to recover property held pursuant to a lien voidable under § 67, even absent consent of the adverse party. See 2 Collier ¶ 23.04 [4] (14th ed.). The 1978 and 1984 Acts continued that trend of increasing the bankruptcy court's summary jurisdiction.

> The Bankruptcy Act, passed pursuant to the power given to congress by Art I, § 8, of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the res. . . .

Id. at 336.

Justice White, in answering the creditor's argument that the exercise of summary jurisdiction would violate the Court's holding in Dairy Queen, said:

> Such a result is not consistent with the equitable purposes of the Bankruptcy Act nor with the rule of Beacon Theatres and Dairy Queen, which is itself an equitable doctrine. In neither Beacon Theatres nor Dairy Queen was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury.

Id. at 39 (citations omitted).

In a different context, the Court in Northern Pipeline said:

> The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress' creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.

Id. at 83 n.35.

The Court recognized in Northern Pipeline that the "reconstructing of debtor-creditor relations" is a pure bankruptcy matter in which Congress could assign jurisdiction to bankruptcy judges. Id. at 71. It can hardly be gainsaid that bankruptcy proceedings are equitable. In all the Bankruptcy Acts, at least from 1841 until the Bankruptcy Act of 1978, however, Congress purposefully excluded the actions of a trustee to avoid and

recover fraudulent and preferential transfers from its designation of matters considered "pure" bankruptcy or "core" bankruptcy proceedings. See Bardes, 178 U.S. 534 (1900); 2 Collier ¶¶ 23.12, 23.13 (14th ed.); Taggart, at 233. It just as purposefully reversed this course of action when it enacted the 1978 and the 1984 Acts.

Granting bankruptcy courts broad jurisdictional powers to entertain actions aimed at resolving disputes between a trustee and an adverse third party resulted, in large measure, from the deleterious effect of disputes over whether a particular issue was subject to summary or plenary jurisdiction.[30] The

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[30] See 1 Collier ¶ 3.01[1][b][iv] (15th ed); see also Countryman, at 6-7.

summary/plenary distinction and the judicial quagmires resulting from the

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30(Cont.) A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction...

It is the purpose of new section 164 of title 28, United States Code, in conjunction with 28 U.S.C. section 1334 ... to eliminate entirely the present jurisdictional dichotomy between summary and plenary jurisdiction.

S. Rep. No. 989, 95th Cong., 2d Sess. 17-18, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5803-04.

disputes it generated were the by-products of the 1898 Act rule that third-party claims were to be tried independently of the bankruptcy forum. Congress, after studying this problem for almost ten years,[31] dramatically altered bankruptcy proceedings in the 1978 Act to correct these deficiencies. It not only reconstructed the mechanics of bankruptcy administration, but completely altered the philosophy underlying the litigation of bankruptcy issues. See Taggart, at 233; Countryman, at 7-12. After the Supreme court declared the jurisdictional provision of the 1978 Act unconstitutional in Northern Pipeline, Congress obviously restructured the jurisdictional grant in

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[31] Congress created the Commission on the Bankruptcy Laws of the United States in 1970, Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. For a discussion of the proposals developed by the Commission and leading to the 1978 act, see 1 Collier ¶ 1.03 (15th ed.).

the 1984 Act. The jurisdictional features of both acts, however, were designed primarily to eliminate a major defect in bankruptcy litigation--the time, resources and efficiency wasted in deciding whether disputes were to be resolved by summary or plenary proceedings. In the 1978 Act, Congress accomplished this purpose in two ways. First, it expanded the bankruptcy courts' jurisdiction and, second, it allowed them to conduct jury trials in cases that previously had been routed to non-bankruptcy forums.[32] In the 1984 Act, Congress achieved this purpose by granting bankruptcy courts summary jurisdiction over all civil proceedings except those only peripherally related to a case under title 11. By this action, Congress brought

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[32] 28 U.S.C. §§ 1471, 1480 (repealed 1984). See generally, Levy, Trial by Jury Under the Bankruptcy Reform Act of 1978, 12 Conn. L. Rev. 1 (1979).

all but a very narrow category of cases[33] affecting the bankruptcy framework, to be litigated in the traditional equitable forum of the bankruptcy court.

It is true that in determining seventh amendment rights we examine issues rather than cases. Ross v. Bernhard, 396 U.S. at 538. Here, however, the issues we examine relate to the restructuring of the debtor-creditor relationship in bankruptcy. American courts have held core bankruptcy proceedings to be equitable from the beginning of our system of bankruptcy.[34] Now, Congress also has determined that actions such as the trustee's in this case

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[33] 28 U.S.C. § 157(a), (b)(1), (c)(1). See Northern Pipeline, 458 U.S. at 92 (Burger, C.J., dissenting); see generally, King, supra.

[34] See Barton v. Barbour, 104 U.S. 126, 134 (1881); Bardes v. First National Bank of

are core bankruptcy proceedings requiring summary disposition by a bankruptcy judge. As such, they assume the historical equitable posture of all such bankruptcy proceedings, and the litigants involved in these actions have no seventh amendment right to a trial by jury.[35]

III.

The Perkinsons contend that, even if the seventh amendment does not mandate that they receive a jury trial, provisions of the 1984 Act nevertheless require it.

34(Cont.) Hawarden, 178 U.S. 524, 535 (1900); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934); Pepper v. Litton, 308 U.S. 295, 304 (1939); Katchen v. Landy, 382 U.S. 323, 337 (1966).

35 See 1 Collier ¶ 3.01[7][b][1] at 3-87 (15th ed.); Matter of McLouth Steel Corp., 55 B.R. 357, 362-63 (Bankr. E.D. Mi.1985); In re American Energy, Inc., 50 B.R. 175, 180 (Bankr. D.N.D. 1985); O'Bannon, 49 B.R. at 766.

Congress could have exceeded constitutional requirements, of course, and statutorily provided a right to trial by jury in all bankruptcy matters. In fact, as we previously noted, Congress took an expansive approach to jury trials in the 1978 Act. See King, at 705; see also Levy, at 10; Countryman, at 7-12; Note, The Bankruptcy Amendments and Federal Judgeship Act of 1984: The Impact on the Right of Jury Trial in Bankruptcy Court, 16 Tex. Tech L. Rev. 535, 541 (1985)(hereafter Note). Section 241(a) of that Act, 28 U.S.C. § 1471, provided in part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other that the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title

11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

Title 28, section 1480, also part of section 241(a) of the 1978 Act, provided in part:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

Rather than expand existing rights to jury trials in bankruptcy proceedings, the 1984 Act drastically restricted such rights. For reasons not completely apparent either in the language of the Act or from its legislative history, Congress went beyond those faults identified by the Supreme Court in Northern Pipeline in restructuring the 1978 Act to eliminate its constitutional

faults. 1 Collier ¶ 3.01[7][b][1] (15th ed.). The pervasive jury trial rights contained in section 1480 under the 1978 act were eliminated. In its stead, Congress provided in part:

> § 1411. Jury trials
>
> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

Pub. L. No. 98-353, § 102(a) (codified at 28 U.S.C. § 1411).

Congress, in the 1984 Act, granted bankruptcy courts the authority to "hear and determine" matters that previously could only be determined in plenary proceedings. 28 U.S.C. § 157(b)(1). Considered against the background of congressional effort to eliminate the systemic problems caused by the plenary/summary distinction, it seems logical to infer from the structure of the

1984 Act that Congress intended all core proceedings to be determined by exercise of summary jurisdiction. See King, at 703; Taggart, at 248. Apart from that, the plain language of section 1411 indicates almost conclusively that litigants such as the Perkinsons have no statutory right to a trial by jury under the 1984 Act.[36] A comparison of section 1480 of the 1978 Act with the cryptic language of section 1411 in the 1984 Act reinforces that conclusion. The general structure of the jurisdiction sections of the 1984 Act, the absence in it of the broad jury trial provision contained in the 1978 Act, and the 1984 language specifically limiting the right to a jury trial to negligence and wrongful death actions effectively forecloses any argument that

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[36] See 1 Collier ¶ 3.01[7][b][1] (15th ed.); McLouth Steel, 55 B.R. at 362; In re American Energy, 50 B.R. at 180; King, at 702-06. But see Note, at 545 et seq.; Taggart, at 260-61.

Congress intended issues such as are involved here to be tried by jury.

The judgment of the district court is affirmed.

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

Since I believe that the Perkinsons are entitled to trial by jury, I respectfully dissent.

Huffman, as a trustee in bankruptcy, commenced adversary proceedings against the Perkinsons to avoid allegedly preferential and fraudulent transfers or voluntary conveyances. The trustee relied both upon federal law to set aside the transfers as preferential and fraudulent,[1] and also upon

[1] 11 U.S.C. §§ 547, 548.

Virginia state law which allows for the voiding of voluntary conveyances. Va. Code § 55-81. The trustee seeks repayment or judgment.[2] There is no property in the hands of the Perkinsons which the trustee seeks to recover. The Perkinsons, who have not filed any claim in the bankruptcy case, challenge the court's jurisdiction and demand trial by jury on the claims asserted by the trustee. The district court did not refer these proceedings to a bankruptcy judge, and this appeal is from an interlocutory order of the district court denying trial by jury.

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[2] As noted by the court, there were two such proceedings instituted by the trustee, one alleging voidable transfer of money and seeking an order requiring repayment or judgment for the transferred amount. The second complaint alleges voidable transfer of negotiable instruments, personal property and services. The relief sought in this second proceeding is judgment for the aggregate value of the transfers. Nowhere does the trustee seek reconveyance of property. Only the first of the two proceedings is here on appeal. The trustee and his co-plaintiff, Bluefield Holding Co., were treated as one by the

My concern is not the trustee's ability to press for the recovery of preferential, fraudulent or voluntary transfers; rather, it is with the determination that the exercise of all avoiding powers at the trustee's disposal are "core proceedings" subject to summary adjudication by the bankruptcy court and free of the Seventh Amendment's jury requirement.

I

I agree with the majority that the district court has jurisdiction, although my reasons differ from those given in the majority opinion.

Congress has the undoubted power to create federal question causes of action, as it has done here, in 11 U.S.C. § 547 for

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2(Cont.) parties and the district court. No question is made of Bluefield's participation in this proceeding.

preferences and § 548 for fraudulent transfers. It also has the undoubted power to authorize a trustee in bankruptcy to proceed against the beneficiary of a preferential or fraudulent transfer under federal substantive law or of a voluntary conveyance under Virginia Code § 55-81 as it has done in 11 U.S.C. § 544(b).

Following the 1978 amendments to the Bankruptcy Code as amended in 1984, the trustee has the power to bring into the bankruptcy case the beneficiaries of preferential, fraudulent or voluntary conveyances, even involuntarily as here. Northern Pipeline requires that when someone is made a party in a proceeding in a bankruptcy case involuntarily, as here, that he be brought into an Article III court. The district judge in this case prudently held to himself the decision in the adversary proceeding and did not refer it to

a bankruptcy judge. By so doing, the district court wisely finessed the even more ticklish question than the one present here.

I can see nothing about bringing the Perkinsons into the case which is a violation of Northern Pipeline and the subsequent case dealing with the same subject, Commodities Future Trading Comm. v. Schor, ___ U.S. ___, 106 S.Ct. 3245 (1986). Neither can I see in this case the exercise by Congress of any authority relating to jurisdiction which it did not have. Since the trustee proceeds against the Perkinsons on both federal and state substantive law grounds, it is a matter of indifference on which ground, if any, he may ultimately be successful for the grounds on which he proceeds must govern the procedure.

It is the nature of the federal and state causes of action which the trustee asserts, as well as the procedural aspect

in which this case finds itself, which must determine whether or not the Perkinsons are entitled to trial by jury, which will be discussed below.

II

The trustee seeks to use his avoiding powers to restore the value of the transferred assets to the debtor's estate.[3] Although the distinction may sometimes be difficult to draw, preferences are generally permitted outside of bankruptcy law while fraudulent or voluntary conveyance law reaches actions taken by a debtor irrespective of the pendency of a bankruptcy case.[4] The

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[3] The avoiding powers employed by this trustee are codified in 11 U.S.C. § 547 (Preferences); § 548 (Fraudulent transfers and obligations); and § 544 (Trustee as lien creditor and as successor to certain creditors and purchasers). 11 U.S.C. § 544(b) authorizes the trustee to fill the shoes of an unsecured creditor and to seek avoidance of "any" transfer voidable under "applicable law." It is by virtue of § 544(b) that the trustee can assert a claim under Virginia's voluntary conveyance statute.

[4] See Jackson, Avoiding Powers in Bankruptcy, 36 Stan. L. Rev. 725 (1984).

justification for fraudulent conveyance law is fundamentally broader than the reasons for a bankruptcy proceeding. The Supreme Court has long recognized the distinction between a fraudulent and preferential conveyance:

> One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is malum per se and the other is malum prohibitum, -and then only to the extent that it is forbidden. A fraudulent conveyance is void regardless of its date; a preference is valid unless made within the prohibited period.

Van Iderstine v. National Discount Co., 227 U.S. 575, 582 (1912). And, we too have previously stated our understanding of the distinct natures of these causes of action. In considering the applicability of West Virginia preference and fraudulent conveyance law in a pre-Code bankruptcy case, a case dealing with § 544(b)'s statutory predecessor, we followed the distinction

recited in Van Iderstine. David v. Woolf, 147 F.2d 629 (4th Cir. 1945).

Fraudulent conveyance law has its origins at least as early as the Statute of 13 Elizabeth and has survived essentially intact for four centuries.[5] In England, well before our independence, the common law actions of trover and money had and received were used to recover preferential payments made by bankrupts. Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932). The claims allowed, indeed created, by these common law actions have long histories and existed at common law in 1791 when we adopted the Seventh Amendment.

The court today decides that federal bankruptcy law rather than the substantive

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[5] 13 Elizabeth ch. 5 (1571). See Kent's Commentaries v. 2, p. 439 (3rd Ed. 1836); Baird & Jackson, Fraudulent Conveyance Law and its Proper Domain, 38 Vand. L. Rev. 829 (1985).

rule of decision controls all procedural aspects of these adversary proceedings, since the dispute involves the restructuring of debtor-creditor relations. But, I should add, that consideration should not be of controlling moment here, for all bankruptcy cases involve such restructuring. It is the very purpose of bankruptcy. While federal law may provide the rule of decision with respect to the preference and fraudulent conveyance claims asserted under 11 U.S.C. §§ 547 and 548, it is clear that Virginia law provides the rule of decision in claims asserted under § 544(b). It is § 544(b) which provides the trustee with authority to assert the state law claim. See Glove v. Martin, 236 U.S. 288, 297 (1914); Stellwagen v. Clum, 245 U.S. 605, 614 (1917) (discussing § 70(e) of the Bankruptcy Act of 1898, the predecessor of § 544(b)). It is also true that the Article I, § 8 bankruptcy power

allows Congress to suspend conflicting state laws, but suspension occurs only to the "extent of actual conflict with the bankruptcy act of Congress." Stellwagen at 613. These cases establish that § 544(b) works no such suspension but rather incorporates state law into the bankruptcy scheme, authorizing the trustee to stand in the shoes of unsecured creditors for purposes of asserting any claims available to them and existing under any law. I do not think that such a claim as here, assertible by creditors if there was no bankruptcy case, and to be determined by exclusive reference to state law, is transformed into a Congressionally created wholly federal claim to "restructure debtor-creditor relations." The historical nature of common or state law claims has been preserved by § 544(b). That section simply works no transformation of

historically legal claims into purely equitable ones. Rather than being a "core proceeding" within the summary jurisdiction of the bankruptcy court, the claim pressed under Virginia Code § 55-81 is ". . . a 'private right' for which state law provides the rule of decision. It is therefore a claim of the kind normally assumed to be at the 'core' of matters normally reserved to Article III courts." Schor, 54 U.S.L.W. at 5102.

The federal question claims of preference under § 547 and fraudulent transfer under § 548 fare no better. In Schoenthal v. Irving Trust Co, 287 U.S. 92 (1932), the Supreme court examined whether or not a claim of preference asserted by a trustee in bankruptcy against the beneficiary of the preference was legal or equitable. In that case, the trustee had asserted his claim of preference in a plenary proceeding in a

district court. The court reversed the court of appeals which had held that a jury trial was not required because the proceeding was equitable and had affirmed the district court which had left the case on the equity side of the docket and tried it without a jury over the defendant's protest. The Court based its decision on the Seventh Amendment right of trial by jury in questions in which the remedy is by action at law. There, as here "[t]he preferences sued for were money payments of ascertained and definite amounts." 287 U.S. at 95. So, Schoenthal is a precise ruling of the Supreme Court on the question at hand, that the substantive federal questions sought to be asserted by the trustee are actions at law, for, if a preference is an action at law when a money judgment is the relief sought, how may a fraudulent conveyance be otherwise when the same relief is asked for? Thus, all

of the causes of action the trustee asserts in this case are legal rather than equitable, and to make the case even stronger, one of them is a cause of action under state law rather than federal.

Congress surely has the power to establish a federal bankruptcy scheme, but the bankruptcy power granted in Article I § 8 (clause 4) is not absolute and cannot be used to abrogate other constitutional guarantees. See, e.g., Louisville Bank v. Radford, 295 U.S. 555 (1934) (bankruptcy power subject to the Fifth Amendment). Indeed, the existence of a federal statutory scheme does not destroy the right to jury trial. Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012 (4th Cir. 1965) (Landrum-Griffin Act).

Civil trial by jury is guaranteed by

the Seventh Amendment.[6] While some trace jury trials from even earlier times, it is settled that clause 39 of Magna Carta preserved the right.[7] Not only has the right a long history, it was a theme of our struggle for independence. There are numerous works which recount the role the right to jury trial in civil cases has played in our history. It was perhaps the only right universally guaranteed by state constitutions prior to the revolution; it was guaranteed in the Northwest Ordinance; and secured by

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[6] The Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ....

[7] See, generally, Pope, The Jury, 39 Tex. L. Rev. 426 (1961); Green, Jury Trial and Mr. Justice Black, 65 Yale L.J. 482 (1956); Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968 Univ. of Va. Press).

the Articles of Confederation.[8] In fact, the Seventh Amendment played a crucial role in ratification of the Constitution. This right, one of "deep interest and solicitude," is to be jealously guarded against encroachment. Parsons v. Bedford, 3 Pet. (28 U.S.) 433-445-46 (1830). It is against this historical backdrop that the Supreme Court has considered the application of the amendment.

The historical test of the cause of action which govern Seventh Amendment jurisprudence was complicated by the merger of law and equity accomplished by the enactment of the Federal Rules of Civil Procedure in 1938. The effect, if any, of the merger, however, has been to enlarge rather than restrict the

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[8] See Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639 (1973); Goebel, History of the Supreme Court of the U.S., Vol. I (1971 Macmillan and Co.).

application of the right to jury trial. In Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), the Supreme court held that where both legal and equitable issues are presented in a single cause, the right to jury trial is lost in only the most imperative circumstances. Three years later, the court stated that there is a right to jury trial on issues material to both legal and equitable relief, even if the legal issues are"incidental" to the equitable issues. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). Still grappling with the problem created by the merger effected by the Federal Rules, the Court emphasized that restrictive application of the Seventh Amendment is not encouraged in Ross v. Bernhard, 396 U.S. 532 (1970). Ross stated that the "seventh amendment question depends on the nature of the issue to be tried rather than the character of the overall action," Id. at

538, and specifically held that there was a right to jury trial on all legal claims in the historically equitable shareholder's derivative suit. The court has upheld the right to jury trial in actions to enforce Congressionally created statutory rights provided the action involves rights and remedies traditionally enforced in an action at law. Curtis v. Loether, 415 U.S. 189 (1974) (Seventh Amendment applies to actions for damages under Title VIII of the Civil Rights Act of 1968); Pernell v. Southall Realty, 416 U.S. 363 (1974) (Seventh Amendment applies to courts established by Congress in the District of Columbia in an action to recover possession of real property). Tull v. United States, 55 U.S. L.W. 4571 (April 28, 1987) (Seventh Amendment guarantees a jury trial to determine liability in actions by the Government seeking civil penalties and injunctive

relief under the Clean Water Act). In Tull, the Court directed that examination of both the nature of the action and the remedy sought governs Seventh Amendment analysis. Absent consent, if the action is one comparable to those which were tried in courts of law in 18th century England, and the remedy sought is legal, the Seventh Amendment attaches. 55 L.W. at 4573.

The principal and perhaps the only difficulty the majority opinion finds with following the usual analysis of determining what is triable to a jury and what is not is Katchen, 382 U.S. 323 (1966). Katchen involved a trustee's plenary action in a federal district court to recover a money judgment for a preference. The beneficiary of the preference, however, had filed two claims in the proceeding, one for back rent, the other for payment he had made as endorser of a note of the bankrupt.

Section 57g of the Bankruptcy Act required that the claim of creditors who had received a preference "should not be allowed unless such creditors shall surrender such preferences. . . ." The trustee objected to the allowance of the creditor's claim, and the court affirmed the referee's decision to proceed to try the question of whether or not there was a preference in order to ascertain whether or not to allow the creditor's claims. In Katchen, the creditor had submitted himself to the jurisdiction of the bankruptcy court by filing his claims. Thus, there was no question of his involuntarily being made a party to the proceeding, the key question on which Northern Pipeline turns. The Court noted its precedent, that Schoenthal and two of its other cases required a jury trial in a plenary proceeding on the question of whether or not a preference

existed, and stated that the question put was whether "the situation is the same when the creditor files a claim and the trustee not only objected to the allowance of the claim but also demands surrender of the preference." 382 U.S. at 328. The Court held specifically that the situation was not the same. The Court based its decision on the power of the bankruptcy court to allow or disallow claims, which it stated was the full power to inquire into the validity of any alleged debt of the bankrupt upon which a demand or claim against the estate was based. 382 U.S. at 329. So, far from holding that a jury trial was not required on the question of the existence of the preference, the holding of Katchen is that jury trial is not required on the question of existence of a preference when the creditor has filed his claim and the trustee objects to the allowance of the claim. The

Court distinguished the situation in which the creditor "presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee," 382 U.S. at 336, which is the precise situation existing in the case before us. To repeat, the Court based the authority for its decision on § 57g which required the bankruptcy court to necessarily determine the amount of the preference so as to ascertain whether the claimant, should he return the preference, had satisfied the condition imposed by § 57g on allowance of the claim. 382 U.S. at 334. Thus, I do not perceive Katchen to be any stumbling block in applying the regular test of whether or not the cause of action asserted is historically legal or equitable. It is obvious that an Article III judge, sitting in a bankruptcy proceeding, may do just that. It is the "district courts" which have jurisdiction in

bankruptcy cases under 28 U.S.C. § 1334, not bankruptcy courts. Under 28 U.S.C. § 157(a), a "district court" "may" refer cases and proceedings to "bankruptcy judges," not bankruptcy courts, who under § 157(b) "may" hear and determine the matters referred (italics added). It would be rather futile to hold, I think, that under Northern Pipeline, if a party is involuntarily brought into a bankruptcy proceeding he must be brought before an Article III court if the Article III court does not have its attendant protections, notably the right to trial by jury.

Finally, I cannot leave the subject without calling attention to the fact that the Supreme Court has expressly rejected the notion that there is some necessary inconsistency between the desire for speedy justice and the right to trial by jury. Pernell, 416 U.S. at 383-84.

The claims asserted by the trustee in this proceeding are historically legal in nature. A money judgment is asked for. The case is pending in a United States district court. I see no reason to deny the Perkinsons their demanded trial by jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

LYNCHBURG DIVISION

In re: BILLY H. HARBOUR, Debtor	CASE NO. 683-00498
DONALD W. HUFFMAN, TRUSTEE, and BLUEFIELD HOLDING COMPANY, Plaintiffs	
v.	Adv. Proceeding 684-0013
DIANA M. PERKINSON and FRANK N. PERKINSON, JR., t/a PERKINSON & PERKINSON, A PARTNERSHIP, Defendants	Civil Action No. 85-0042-R

O R D E R

For the reasons set forth in the Memorandum Opinion filed contemporaneously herewith, it is hereby ADJUDGED and ORDERED that the Defendants' motions for abstention and for a jury trial are hereby DENIED. It is FURTHER ORDERED that this case be REMANDED to the Bankruptcy Court for the Western District of Virginia in Roanoke, Virginia.

The Clerk is directed to send certified copies of this Order to all

counsel of record.

ENTER this 27th day of August, 1985.

s/ Jackson L. Kiser
United States District Judge

PERTINENT TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS CITED IN PART V1 OF THE PETITION

(1) Constitution of the United States

Article 1, Section 8, Clause 4 which in pertinent part is as follows:

> "The Congress shall have the power... to establish... uniform laws on the subject of bankruptcies throughout the United States;...."

Amendment V11 which pertinent part is as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved,...."

(2) United States Code

11 U.S.C. § 544(b)

> "(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title."

11 U.S.C. § 547 which is pertinent part is as follows:

"(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

(1) to or for the benefit of the creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title

(c) The trustee may not avoid under this section a transfer —

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

11 U.S.C. § 548 which in pertinent part is as follows:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (1) made such transfer or incurred such obligaton with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred , indebted; or
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

28 U.S.C. § 157 which in pertinent part is as follows:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(b)(2) Core proceedings include, but are not limited to —

(F) proceedings to determine, avoid, or recover preferences;

(H) proceedings to determine, avoid, or recover fraudulent conveyances

(d) The district court may withdraw, in whole or in part, any

case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. ..."

28 U.S.C. § 1334 which in pertinent part is as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(3) Code of Virginia of 1950 as amended to date

Va. Code § 55-81 provides

> Voluntary gifts, etc., void as to prior creditors. — Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void

as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.

Supreme Court, U.S.
FILED
MAY 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

RECORD NO. 87-1760

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

DIANA M. PERKINSON AND FRANK N. PERKINSON, JR., t/a PERKINSON & PERKINSON, A PARTNERSHIP

Petitioners

v.

DONALD W. HUFFMAN, TRUSTEE FOR BILLY H. HARBOUR, DEBTOR; AND BLUEFIELD HOLDING COMPANY

Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RECORD NO. 87-1760

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

DIANA M. PERKINSON AND FRANK N. PERKINSON, JR., t/a PERKINSON & PERKINSON, A PARTNERSHIP

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QUESTIONS PRESENTED

Respondents submit these questions to this Court:

I. ARE DEFENDANTS WHO HAVE RECEIVED TRANSFERS OF MONEY OR PROPERTY FROM A DEBTOR OR FROM AN ASSET OF THE DEBTOR'S BANKRUPTCY ESTATE ENTITLED TO TRIAL BY JURY WHEN SUED BY THE BANKRUPTCY TRUSTEE TO RECOVER FOR THE BANKRUPTCY ESTATE THOSE TRANSFERS?

II. SHOULD ARTICLE III JUDGES BE REQUIRED TO REMOVE ACTION FROM BANKRUPTCY JUDGES WHEN SUCH ACTIONS ARE "CORE" PROCEEDINGS IN THE CONGRESSIONAL BANKRUPTCY SCHEME?

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In the matter of Silver Mill Frozen Foods, Inc. 80 B.R. 848 (B.C. W.D. Mich. 1987)	10, 11

STATEMENT REGARDING THE OPINIONS BELOW AND THE COURT'S JURISDICTION

Petitioners have attached the opinion of Judge Sprouse from the 4th Circuit Court of Appeals as an appendix to their petition. Respondent incorporates Petitioners' appendix as if restated in full herein.

While Respondent may disagree with the conclusions drawn and stated by Petitioners in their "Statement of Grounds to Invoke Jurisdiction", Respondent is aware that this Court may grant a writ before a final judgment is entered. Therefore, Respondents do not challenge Petitioners' statements contained in their Section V.

CONSTITUTIONAL AND

STATUTORY PROVISIONS INVOLVED

Respondent incorporates Petitioners' Constitutional and Statutory provisions involved.

BEST AVAILABLE COPY

STATEMENT OF THE CASE

Respondent concurs with Petitioner's statement of the case, but would submit a clarification regarding Bluefield Holding Company. Bluefield Holding Company was wholly owned by Billy H. Harbour, the Debtor. As such it is an asset of the bankruptcy estate and under the supervision of the Bankruptcy Court.

ARGUMENT

I. PETITIONERS HAVE NOT STATED GROUNDS WHICH JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Petitioners have requested a Writ of Certiorari on several proposed grounds. Petitioners assert that the right to a jury trial in their case is mandated by the United States Constitution, and that the lower Courts' denial of this asserted right conflicts with the decisions of the Supreme Court.

Petitioners fail to identify any conflicts between appellate courts but do cite one bankruptcy court case which gives a similarly-situated Defendant such a right. The Petitioners have also asserted that this matter should be heard by an Article III Judge because they "contend the proceeding is not a 'core' proceeding . . ."

A. PETITIONERS HAVE FAILED TO SHOW A CONFLICT WITH OTHER DECISIONS REQUIRING THEIR CASES TO BE HEARD BY AN ARTICLE III JUDGE.

Petitioners have shown no conflict with other circuits, or prior decisions of this Court, as to the issue of whether the Trustee's action must be heard by an Article III Judge. In fact, Petitioners assertion that the suits brought by the Trustee are not core proceedings ignores the plain language of 28 U.S.C. § 157(b)(1). Nor have the Petitioners challenged the constitution-

ality of 28 U.S.C. § 157 and the Congressional grant of jurisdiction to Bankruptcy Courts. Since the Petitioners have not shown that there is a conflict with other appellate courts, that this question is sufficiently important for Supreme Court review, or that the decision below calls for an exercise of the Supreme Court's supervisory powers, the petition should be denied.

B. PETITIONERS HAVE FAILED TO SHOW A CONFLICT WITH OTHER DECISIONS PERMITTING A RIGHT TO A JURY TRIAL IN THEIR CASES.

Petitioners' primary claim revolves around the assertion that actions to avoid preferential transfers and to rescind fraudulent conveyances are really actions at law. As such, a Fifth Amendment right to a jury trial would attach. Petitioners also assert that the attachment of this right is mandated by decisions of this Court, specifically

Schoenthal v. Irving Trust Company, 287 U.S. 92 (1932) ("Schoenthal"), and Northern Pipeline Company v. Marathon Pipeline, 458 U.S. 50 (1981) ("Northern Pipeline").

Bankruptcy Courts are traditionally considered Courts of equity. See Katchen v. Landy, 382 U.S. 323, at 327, (1966) and Curtis v. Loether, 415 U.S. 189, at 195 (1974). Jurisdiction to hear the actions brought by the Trustee in this case is conferred by statute. See 28 U.S.C. § 157. Congress obviously intended the Bankruptcy Courts to have the power to hear and decide matters surrounding the Debtor and his estate, including administrative matters and questions between the estate and its creditors. See Katchen, 382 U.S. at 327.

Petitioners rely on Supreme Court cases decided prior to the Bankruptcy Amendments and Federal Judgeship Act of

1984 ("1984 Act") and fail to point to any Courts of Appeal decisions which support their position. Since the passage of the 1984 Act, and in harmony with decisions of this Court, the weight of authority in Bankruptcy Courts in other districts is that there is no right to a jury trial in core proceedings brought in the Bankruptcy Court. See In re Chase & Sanborn Corp., 54 B.R. 43 at 44 (B.C. S.D. Fla. 1985); In re Reda, Inc., 60 B.R. 178 at 180-181 (B.C. N.D. Ill. 1986). In the one case cited by Petitioners, In the matter of Silver Mill Frozen Foods, Inc., 80 B.R. 848 (1987), the Judge reached the anomalous conclusion that Defendants who have filed proofs of claim are not entitled to jury trials while Defendants who have not filed proofs of claim are entitled to jury trials. Judge Howard, in reaching his decision, stated "A

Court, however, cannot ignore clear precedents merely because those precedents do not comport with the Court's common sense." In the matter of Silver Mill Frozen Foods, Inc., 80 B.R. at 854.

The Courts below examined the same precedents as Judge Howard but failed to see the "clear precedents" referred to in Judge Howard's opinion. The Courts below have correctly interpreted the precedents and in so doing have reached the correct decision.

While there may be some conflict between Bankruptcy Courts, Petitioners have failed to point to any conflicts between Federal Court of Appeal. The asserted conflict with prior decisions of this Court ignores the reasoning of Congress' enactments and the plain language of cases cited, such as Katchen, at 328.

II. TO MODIFY THE DECISION BELOW WOULD DISMEMBER THE STATUTORY BANKRUPTCY SCHEME.

To overturn the ruling below would create confusion and chaos within the bankruptcy system. Bankruptcy Courts would no longer be forums for the summary adjudication of matters relating to a bankruptcy estate. Nor would debtors be able to have their disputes with creditors quickly and fairly decided. Issues would be subjected to lengthy trials, before juries, with little or no concept of the statutory mandates. Bankruptcy cases would be left open and on the docket for a longer period of time, thus further burdening the already overloaded Bankruptcy Court system. "The expeditious and cost effective administration of the bankruptcy courts would become jeopardized if routine preference actions such as this one would

necessitate jury trials. See In re Reda, supra at 180, N.7, citing In re Best Pack Seafood, Inc., 45 B.R. 194, at 195 (B.R. D. Me. 1984).

Judge Sprouse's well reasoned opinion below accurately and correctly considered these factors. While he did not specifically so state, it is clear from the opinion that the Court below feels that a different decision would have the effect of dismembering the statutory scheme of the Bankruptcy Amendments and Federal Judgeship Act of 1984. See Curtis, at 195, citing Katchen, at 339.

CONCLUSIONS

Petitioners have failed to establish sufficient reasons for this Court to grant a Writ of Certiorari. The Court below has fully and fairly considered the issues and has returned a decision in harmony with prior decisions

of this Court. The petition should further be denied because to overturn the lower Courts' decisions would dismember Congress' bankruptcy scheme as well as propagate confusing, chaotic, and anomalous results within the bankruptcy scheme.

Respectfully submitted,

DONALD W. HUFFMAN,
TRUSTEE FOR BILLY H.
HARBOUR, DEBTOR; AND
BLUEFIELD HOLDING COMPANY

BY 
Their Counsel

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Suite 200
Roanoke, Virginia 24011
(703) 982-1755

PROOF OF FILING AND SERVICES

I, Donald W. Huffman, counsel for the Respondents and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the

20th day of May, 1988, I filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of same in a duly addressed envelope by Federal Express with postage thereon prepaid addressed to Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, Northeast, Room 30, Washington, D.C. 20543; and I also served a true copy of the foregoing petition on the Petitioners by mailing three copies of same in a duly addressed envelope by first class mail with postage thereon prepaid addressed to John H. Kennett, Jr., Esquire, 133 Kirk Avenue, S.W., Roanoke, Virginia 24011.

Counsel for Respondents

STATE OF VIRGINIA,

CITY OF ROANOKE, TO-WIT:

The foregoing proof of filing and service was subscribed and sworn to before me by Donald W. Huffman this 20 day of May, 1988.

My commission expires: 9/10/91

Sherri Casdorph
Notary Public

FILED
MAY 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

RECORD NO. 87-1760

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

DIANA M. PERKINSON and FRANK N. PERKINSON, JR., t/a PERKINSON & PERKINSON, A PARTNERSHIP

Petitioners

v.

DONALD W. HUFFMAN, TRUSTEE FOR BILLY H. HARBOUR, DEBTOR; AND BLUEFIELD HOLDING COMPANY

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

The Petitioners reply to arguments first raised in the brief by the Respondents in opposition to the Petitioners' petition for a writ of certiorari.

1. THE PETITIONERS HAVE STATED GROUNDS WHICH JUSTIFY GRANTING A WRIT OF CERTIORARI

The Respondents cite two additional decisions holding there is no right of trial by jury in "core" proceedings brought in a bankruptcy court. *In Re Chase & Sanborn Corp.*, 54 B.R. 43 (S.D. Fla. 1985) and *In Re Reda, Inc.*, 60 B.R. 178 (N.D. Ill.—1986). The first case contains no reasoned opinions. In the latter case, the bankruptcy judge noted there was no preference at common law and accordingly a suit to recover a preference, even in terms of money damages, could not be an action at common law where right of trial by jury is preserved

by the Seventh Amendment. Specifically the Court held:

> "The debtor is not really seeking damages for an injury. Instead the debtor by pursuing a preference action is seeking to recover a sum of money improperly paid to the creditor..." 60 B.R. at page 181.

While a preference was not known at common law, when money was improperly paid and then sought to be recovered (whether it be from the tax collector or adverse party to a contract), the common law action was for money had and received also called indebitatus assumpsit or general assumpsit. See *Riverside Company v. Husted*, 109 Va. 688, 64 S.E. 958 (1909). *In Re Reda, Inc., supra,* also held the right of trial by jury was required on the second count dealing with a state law conversion and consequently should be tried by the district court . In that case, the preference count was tried by the bankruptcy

judge without a jury and the conversion claim was tried by the district judge with a jury. Here all nine claims by the Respondents against the Petitioners are asserted by three alternate theories. It is not known which of the three theories, if any, will prevail on each claim. The preference is the least likely theory of recovery and the voluntary conveyance under state law is the most likely theory of recovery of each claim. Thus the jury and non jury aspects cannot be divided even if there were no right of trial by jury for preferential claims.

The claims by the Respondents are against lawyers for allegedly over-charging their clients. If they did not overcharge in accordance with principles of state law, there could be no preferential payments or fraudulent payments or voluntary payments. Since one lawyer is not involved except as a partner, his entire

liability is regulated by the state law of dealing with partnerships. As Mr. Justice (now Chief Justice) Rehnquist wrote in his concurring opinion in *Northern Pipeline Company v. Marathon Pipe Line*, 458 U.S. 53, 73 L.2d 598, 102 Sup. Ct. 2858 (1981):

> "... The law suit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of traditional actions at common law tried by courts at Westminister in 1789." 450 U.S. at page 90.

The law suits called adversary proceedings in which the Petitioners herein were named defendants seeks damages for precisely the same reasons and then rephrases the same in terms of preferential transfers, fraudulent transfers and voluntary transfers; but there could be no such transfers unless there was a breach of contract or misrepresentation

about the legal fees. Suing a lawyer for overcharging a client is the "stuff" of traditional jury trials at common law.

11. RETENTION OF THE STATUTORY BANKRUPTCY SCHEME IS NOT A REASON TO UPHOLD THE DECISION BELOW.

The main reason for this reply brief is to answer the new argument of the Respondents citing footnote 7 of *In Re Reda, supra,* at page 180 stating the expeditious and cost effective administration of bankruptcy courts will be jeopardized if routine preference actions necessitate jury trials. This footnote in turn cites *In Re Best Pack Seafood, Inc.,* 45 B.R. 194 (D. Me. 1984). This latter decision held:

> "... Congress has apparently determined that core proceedings are proceedings dealing with 'restructing of debtor-creditor relations, which is at the core of the federal bankruptcy power..." 45 B.R. at page 194.

Since the Petitioners have filed no proof of claim as creditors of the Respondents, there is no debtor-creditor relationship. Instead the Petitioners are being sued by the Respondents for damages arising from tortious conduct under a previous contractual relationship with the Debtor. The decision also holds:

> "The added delay and expense of trial by jury of these core proceedings would frustrate the expeditious and effective administration of bankruptcy cases. Congress may accommodate the right of trial by jury to the need for expeditious proceedings. 45 B.R. at page 195.

If that be true, then Congress could apparently provide that persons charged with crimes could be forthwith sentenced to prison by police authorities because trial by jury is time consuming and expensive. The Petitioners suggest that trial by jury is the most perfect way to resolve a dispute and is neither time

consuming nor complicated when competent lawyers serve as adversaries and competent judges preside. The Petitioners suggest there is nothing routine about the Respondents suring them for damages totaling $125,713.49 (and an additional $144,060.81 in a second adversary proceeding pending the decision in this case). Even if the claims by the Respondents against them are bloated, a judgment in favor of the Respondents for a substantial portion of the claims would ruin the Petitioners financially and destroy two fine lawyers who have given years of service to the bar and the community. To deny them the right of trial by jury in a court of competent jurisdiction because an administrative decision would be more expeditious and cost effective is to disregard the Constitution and eliminate the need for courts. Furthermore people who understand the judicial

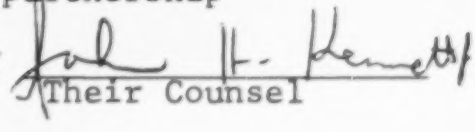
process know disputes are better settled when tried by an independent judiciary; and when the testimony of witnesses are in conflict, litigants (even those who lose) accept jury verdicts.

CONCLUSION

The Respondents argument first raised in the brief in opposition to the petition for a writ of certiorari that trial by jury in judicial courts must be eliminated in favor of expeditious administrative proceedings is an invitation to tyranny and must be rejected.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies he is a member of the bar of the Supreme Court of the United States and counsel of record for the Petitioners; and on May 27, 1988, he served this Reply Brief on the Respondents by mailing three true copies of same in an envelope by first class mail with postage thereon prepaid addressed to their counsel of record, Donald W. Huffman, Esquire, 123 Church Avenue, Southwest, Roanoke, Virginia 24011.

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